# DOCKET

No. 08-678
Title: Mohawk Industries, Inc., Petitioner
v.
Norman Carpenter
Docketed: November 24, 2008
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (07-15208-GG, 07-15691-GG)
Decision Date: August 26, 2008
Questions Presented

| Date | Proceedings and Orders |
|---|---|
| Nov 20 2008 | Petition for a writ of certiorari filed. (Response due December 24, 2008) |
| Dec 23 2008 | Brief of respondent Norman Carpenter in opposition filed. |
| Jan 6 2009 | Reply of petitioner Mohawk Industries, Inc. filed. (Distributed) |
| Jan 7 2009 | DISTRIBUTED for Conference of January 23, 2009. |
| Jan 26 2009 | Petition GRANTED. |
| Feb 13 2009 | The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including April 13, 2009. |
| Apr 10 2009 | The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including April 27, 2009. |
| Apr 27 2009 | Joint appendix filed. Statement of costs received. |
| Apr 27 2009 | Brief of petitioner Mohawk Industries, Inc. filed. |
| May 4 2009 | Brief amicus curiae of DRI - Voice of the Defense Bar filed. |
| May 4 2009 | Brief amicus curiae of American Bar Association filed. |
| May 4 2009 | Brief amicus curiae of Chamber of Commerce of the United States of America filed. |
| May 6 2009 | The time within which to file respondent's brief on the merits is extended to and including June 26, 2009. |
| Jun 23 2009 | The time within which to file respondent's brief on the merits is further extended to and including July 6, 2009. |
| Jul 6 2009 | Brief of respondent Norman Carpenter filed. |
| Jul 13 2009 | Brief amicus curiae of United States filed. |
| Jul 13 2009 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Jul 13 2009 | Brief amici curiae of Former Article III Judges and Law professors filed. |
| Jul 16 2009 | SET FOR ARGUMENT ON Monday, October 5, 2009. |
| Jul 17 2009 | CIRCULATED. |
| Aug 5 2009 | Reply of petitioner Mohawk Industries, Inc. filed. (Distributed) |
| Aug 17 2009 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Sep 1 2009 | Record received from U.S.C.A. for 11th Circuit. (1 Box) |
| Oct 5 2009 | Argued. For petitioner: Randall L. Allen, Atlanta, Ga. For respondent: Judith Resnik, New Haven, Conn.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) |
| Oct 19 2009 | Letter, dated October 15, 2009, received from counsel for the respondents. (Distributed). |

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# PETITION
# FOR
# WRIT OF
# CERTIORARI

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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

*Petitioner,*

*v.*

NORMAN CARPENTER,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

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# QUESTION PRESENTED

Whether a party has an immediate appeal under the collateral order doctrine, as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), of a district court's order finding waiver of the attorney-client privilege and compelling production of privileged materials.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioner, Mohawk Industries, Inc. ("Mohawk") states that it is a publicly-traded corporation incorporated under the laws of Delaware. Mohawk has no parent corporation, and no publicly-traded company owns ten percent or more of its stock.

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Petitioner, Mohawk Industries, Inc. respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in *Carpenter v. Mohawk Industries*, No. 07-5208-G; 07-15691-G.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit that gives rise to this Petition is reported as *Carpenter v. Mohawk Industries, Inc.*, 541 F.3d 1048 (11th Cir. 2008). The opinion of the Northern District of Georgia at issue in the appeal to the Eleventh Circuit was an October 1, 2007 opinion in the case of *Carpenter v. Mohawk Industries, Inc.*, 4:07-CV-0049-HLM.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion and judgment in this matter on August 26, 2008. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

28 U.S.C. § 1291, provides in relevant part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

## STATEMENT OF THE CASE

This case involves the District Court's finding of waiver of the attorney-client privilege based on three sentences contained in a brief filed in a separate case, and in particular for this Petition, whether such an order is immediately appealable under the collateral order doctrine. Petitioner Mohawk Industries, Inc. ("Mohawk") seeks a writ of certiorari so that the Court can resolve the conflict among the United States courts of appeals regarding the applicability of collateral order jurisdiction in cases compelling the disclosure of information protected by the attorney-client privilege.

Mohawk conducted an internal investigation through outside counsel following an allegation by an employee that Mohawk was violating federal immigration laws. The District Court's order at issue here requires Mohawk to divulge written and oral communications—found by the District Court to be properly privileged—between the company and the outside counsel that conducted the internal investigation. After the District Court found that Mohawk had waived the attorney-client privilege with respect to information and attorney-client communications that would otherwise be protected from disclosure by the privilege and ordered the disclosure of the privileged information, Mohawk immediately appealed. The Eleventh Circuit, however, dismissed the appeal for lack of jurisdiction, refusing to apply the collateral order doctrine under *Cohen*, joining six other circuits that have declined collateral order jurisdiction in this context. The Eleventh Circuit's ruling was in direct conflict with three other circuits that have permitted immediate appeals in this context under the collateral order doctrine.

This Court has never addressed the issue of collateral order jurisdiction in the context of waiver of the attorney-client privilege.

## I. Basis for Federal Jurisdiction in District Court.

Respondent, Norman Carpenter, filed this lawsuit on March 15, 2007, and filed an Amended Complaint on May 2, 2007. Jurisdiction was appropriate under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a), based on Respondent's allegation that Mohawk conspired to deter him from testifying in another federal case, in violation of 42 U.S.C. § 1985(2).

## II. Respondent's Conduct During his Employment at Mohawk.

Mohawk is a leading producer and distributor of residential and commercial flooring products. Headquartered in Calhoun, Georgia, Mohawk employs over 36,000 people worldwide. Respondent is a former shift supervisor at a Mohawk manufacturing facility in Calhoun. During his employment at Mohawk, Respondent requested that Mohawk have a temporary agency hire an individual, even though Respondent believed "[h]er [work authorization] papers . . . are not good." [R: 37-2, Ex. A, p. 5.] Mohawk's Human Resources division rejected Respondent's request. Respondent then sent an e-mail to Human Resources on November 28, 2006 stating that

> 90% of the people that come through the temp do not have good papers. That's why they come to us that way. I can tell you that most of the people working here today here

> through a temp do not have one of two things, either a Georgia I.D. or good papers through the I.N.S.

[R: 12, ¶ 32.]

## III. Mohawk's Investigation of Respondent.

In response to this e-mail, Mohawk conducted an immediate investigation of Respondent's conduct and his assertions that Mohawk employed undocumented workers. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo (then a partner in the Washington D.C. office of Sidley Austin LLP), interviewed Respondent and other individuals. Mr. Morillo is counsel for Mohawk in a pending class action lawsuit, *Shirley Williams v. Mohawk Industries, Inc.*, Civil Action No. 4:04-CV-03-HLM (N.D. Ga. filed July 28, 2004).[1]

Mohawk ultimately terminated Respondent's employment. A few months later, Respondent filed this lawsuit. Respondent claims that Mohawk, some of its employees, and its in-house and outside counsel engaged in a conspiracy and threatened Mr. Carpenter (during the Morillo interview) and terminated his employment to keep him from testifying in the *Williams* case. [R: 12, ¶ 39.]

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[1] The *Williams* case has also been before this Court. *See Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006). The *Williams* case is currently on appeal with the Eleventh Circuit from the District Court's denial of class certification. *Williams v. Mohawk Indus., Inc.*, No. 08-13446-GG.

## IV. Motion for an Evidentiary Hearing in *Williams.*

Less than a week after Respondent filed this lawsuit, the *Williams* plaintiffs filed (in the *Williams* case) an Emergency Motion for an Evidentiary Hearing to address Respondent's unverified allegations. [R: 43, p. 3-4.] The *Williams* plaintiffs sought, among other things, to compel the testimony of Mr. Morillo. Mohawk opposed the motion and in its brief stated:

> After receiving [the e-mail], Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo, interviewed Mr. Carpenter.

[R: 43, p. 5.] The district court in *Williams* determined that the Emergency Motion for an Evidentiary Hearing was premature, and no hearing ever took place in the *Williams* class action. [R: 43, p. 8.]

## V. The District Court Opinion.

In the District Court, Respondent sought discovery related to Mohawk's internal investigation. Mohawk objected on the grounds of attorney-client privilege to several of the discovery requests related to the privileged Morillo interview and the decision to terminate Respondent's employment. [R: 43, p. 1.]

Respondent argued first, that there was no privilege over the communications at issue and second, that if a privilege existed, that it had been waived.

On October 1, 2007, the District Court ruled that an attorney-client privilege attached to the communications in question. Appendix B, p. 42a. The District Court, however, found that Mohawk waived the privilege with respect to the communications relating to (1) Mr. Morillo's interview of Respondent and (2) the decision to terminate Respondent's employment. *Id.* at 51a. Notably, the record did not contain any evidence or testimony concerning the alleged waiver of privileged communications before the Court. No depositions had taken place in the case. Rather, the District Court found waiver of the attorney-client privilege based on these three sentences cited in Mohawk's brief opposing the emergency hearing in the *Williams* case where Mohawk stated:

> After receiving [the e-mail], Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo, interviewed Mr. Carpenter.

*Id.*

The District Court reasoned that:

> By making these representations, Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that the Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of the Plaintiff and the decision to terminate the Plaintiff's employment.

*Id.*

The District Court recognized that Mohawk "understandably, likely will wish to appeal from this Order." *Id.* at 52a. The District Court observed that appealing the Order as interlocutory under 28 U.S.C. § 1292(b) would not necessarily be appropriate, but suggested that Mohawk may have other avenues to appeal, such as a petition for mandamus or appealing under the collateral order doctrine. *Id.* The District Court stayed the deadline for Mohawk to produce documents and supplement discovery responses in the event that Mohawk chose to appeal. *Id.*

## VI. Appeal.

Mohawk appealed to the United States Court of Appeals for the Eleventh Circuit, challenging the District Court's order finding waiver of the attorney-client privilege. Mohawk also filed a Petition for Writ of Mandamus. In its appeal, Mohawk argued that the Eleventh Circuit should exercise collateral order jurisdiction to review the District Court's finding of waiver, as the Eleventh Circuit had never addressed whether collateral order jurisdiction was appropriate in this context. Appendix A, p. 9a.

Without addressing the merits of Mohawk's privilege argument, the Eleventh Circuit dismissed Mohawk's appeal on August 26, 2008 holding that "the challenged discovery order is not an appealable order under *Cohen.*" *Id.* at 10a. The Eleventh Circuit further denied Mohawk's petition for mandamus because it found that Mohawk did not demonstrate that "its right to issuance of the writ is 'clear and indisputable.'" *Id.* at 2a. On October 8, 2008, the Eleventh Circuit granted Mohawk's motion to stay the issuance of the mandate pending this Petition.

# REASONS FOR GRANTING THE PETITION

## I. This Case Presents a True and Irreconcilable Conflict Among the Circuit Courts of Appeals.

The Eleventh Circuit's decision not to exercise collateral order jurisdiction under *Cohen* to review an otherwise interlocutory order finding waiver of the attorney-client privilege and compelling disclosure of privileged information directly conflicts with decisions of other circuits. This is a circuit conflict openly acknowledged by the Respondent and readily acknowledged by the Eleventh Circuit in its opinion, stating that "[a] number of circuits have addressed the issue, and there are decisions on both sides." *Id.* at 9a.

Three circuit courts of appeals have found that review under the collateral order doctrine is appropriate in cases implicating the attorney-client privilege. *UMG Recording, Inc. v. Bertelsmann AG (In re Napster, Inc. Copyright Litig.)*, 479 F.3d 1078, 1087-88 (9th Cir. 2007) (holding that appellate jurisdiction was appropriate under the collateral order doctrine to review whether attorney-client privilege was lost under the crime-fraud exception); *United States v. Philip Morris Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003) (exercising jurisdiction under the collateral order doctrine to review the district court's order to produce a document protected by the attorney-client privilege); *Kelly v. Ford Motor Co., (In re Ford Motor Co.)*, 110 F.3d 954 (3rd Cir. 1997) (exercising jurisdiction under the collateral order doctrine of a district court's order to produce attorney-client privileged documents).

In *Ford*, a products liability action, the Third Circuit examined the district court's order requiring defendant Ford Motor Company to produce documents that Ford claimed were protected by the attorney-client privilege and work product doctrine. Ford, like Mohawk in this case, filed a notice of appeal and also a separate petition for writ of mandamus in response to the order. On appeal, the Third Circuit went through an extensive and thorough analysis of this Court's collateral order cases and the basis for appellate jurisdiction under the collateral order doctrine. *Ford*, 110 F.3d at 957-964. The court ultimately determined that discovery orders requiring disclosure of privileged information were appropriate for appellate review under the collateral order doctrine. *Id.* at 963.

The D.C. Circuit took up the issue presented in *Philip Morris*, 314 F.3d 612. There, the district court issued a discovery order requiring defendant British American Tobacco Ltd. ("BATCo") to produce a memorandum prepared by its attorney. BATCo argued that the memorandum was protected by the attorney-client privilege, but the district court found that the privilege had been waived by BATCo's failure to list the memorandum in its privilege log. *Id.* at 616. In response to the district court's order, BATCo filed a notice of appeal and, alternatively, petitioned for a writ of mandamus. *Id.* at 614. The government argued that this case was distinguishable from *Ford* because the issue here concerned waiver of the privilege, whereas *Ford* involved the appropriateness of a claim of privilege.

*Id.* at 618. This argument was rejected by the D.C. Circuit, stating:

> A decision defining the contours of a waiver of privilege is no less 'important' for *Cohen* purposes than a ruling on the contours of the privilege itself. An erroneous finding of waiver, like an erroneous ruling denying a claim of privilege, eviscerates the same important institutional interests in preserving privileged information, and derivatively, full and frank communication between client and attorney.

*Id.* After considering the conflict among the circuits regarding the proper method of review of an "adverse privilege order," the D.C. Circuit held that appellate review under the collateral order doctrine was appropriate. *Id.* at 619-21.

Most recently, the Ninth Circuit examined the collateral order issue in the copyright infringement case of *In re Napster*, 479 F.3d 1078. There, defendant Bertelsmann appealed the district court's order compelling disclosure of privileged attorney-client communications relating to a loan Bertelsmann had given to Napster. The district court ordered production because it found that, though the communications were privileged, plaintiffs had made a "prima facie" showing of the crime-fraud exception to the attorney-client privilege. *Id.* at 1087. Defendant Bertelsman filed a notice of appeal and petitioned for a writ of mandamus. *Id.* at 1087. The Ninth Circuit found that it had jurisdiction to review the district court's order because all elements of the collateral order test were satisfied, specifically finding that "once privileged materials are ordered disclosed, the practical effect of the order is often 'irreparable by any subsequent appeal.'" *Id.* at 1088, 1089 (quoting *United States v. Griffin*, 440 F.3d 1138, 1142 (9th Cir. 2006)).

Six circuit courts of appeals (prior to this case) are in conflict with the three circuit courts cited above, and have held that a discovery order implicating the attorney-client privilege is not appealable under the collateral order doctrine. *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 458, 459 n. 2 (1st Cir. 2000)("discovery orders generally are not thought to come within [the collateral order doctrine]"; a "perfect example of a discovery order that is not immediately appealable" under the collateral order doctrine is one involving a party's claim of attorney-client privilege); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993) (declining jurisdiction); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993)(order requiring plaintiff to produce certain documents that it claimed were subject to attorney-client privilege was not immediately appealable under the collateral order doctrine); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir. 1992) (holding that discovery orders are not appealable under the collateral order doctrine); *Reise v. Bd. of Regents of Univ. of Wis. Sys.*, 957 F.2d 293, 295 (7th Cir. 1992) ("orders to produce information over strong objections based on privilege are not appealable"); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991) (order compelling discovery of attorney opinion letters was not immediately appealable under the collateral order doctrine).

In *Boughton*, defendants sought to appeal the district court's order to produce documents relating to state and federal uranium mill licensing issues, claiming that the district court had erred in determining that the documents were not protected from discovery by the attorney-client privilege, the work product doctrine, and/or the non-testifying expert privilege. *Boughton*, 10 F.3d at 748. The Tenth Circuit held that the *Cohen* exception did not apply to defendants' appeal, based on its finding that the discovery order was not effectively unreviewable on appeal. *Id.* at 750. In its analysis, the court stated that "if this court determines that privileged documents were wrongly turned over to the plaintiffs and were used to the detriment of defendants at trial, we can reverse any adverse judgment and require a new trial." *Id.* at 749.

In *Quantum*, 940 F.2d 642, the Federal Circuit similarly concluded that a district court's order requiring the production of allegedly privileged documents was not reviewable under the collateral order doctrine because the order was effectively reviewable on appeal from a final judgment. *Id.* at 644. The documents in question in this patent infringement suit were pre-litigation opinion letters of counsel.

In a cursory analysis, the Fifth Circuit looked at the issue presented in *Texaco*, 995 F.2d 43. In *Texaco*, the magistrate judge issued an order requiring Texaco to produce documents that it claimed were protected by the attorney-client privilege. *Id.* at 43. Texaco filed a notice of appeal and petitioned for a writ of mandamus. *Id.* The petition for writ of mandamus was denied. *Id.*

The Fifth Circuit declined to exercise jurisdiction under the collateral order doctrine and dismissed Texaco's appeal. The Fifth Circuit's decision in *Texaco* did not, however, contain any analysis of *Cohen*. Instead, the court simply applied Fifth Circuit precedent and stated that "we make no comment as to the correctness of the rule . . . [that a discovery order is not subject to appeal], but merely apply circuit precedent by which we are bound." *Id.* at 44.

Notably, two of the courts of appeals that reject the application of the collateral order doctrine in cases involving privilege have suggested that a party should, in absence of direct appeal, refuse to comply with the order and then seek review of the resulting sanctions. In *Reise*, 957 F.2d 293, the Seventh Circuit explained the potential review process, stating that "[a] party aggrieved by the order assures eventual review by refusing to comply. The district judge then imposes sanctions." *Id.* at 295. The First Circuit has similarly suggested that a party may "refuse to comply with the order and thus invite a finding of contempt." *Ogden*, 202 F.3d at 459 n. 2. The ineffectiveness of this as an alternative to appeal is addressed below.

The Court should grant certiorari to resolve this conflict among the courts of appeals. This conflict continues to percolate, has been litigated across the courts of appeals, and will not resolve itself absent consideration by this Court. In the nine cases prior to this one that have ruled on the issue, notably, none of the losing parties ever petitioned for certiorari.

Therefore, this Court has not had the opportunity to decide whether it is appropriate for a court of appeals to exercise collateral order jurisdiction to review an order finding waiver of the attorney-client privilege and compelling the production of privileged information. This case presents the issue unencumbered and provides a needed opportunity for the Court to finally settle this conflict. Finally, resolution of the question presented in this case will provide consistent guidance to the courts of appeals.

## II. This Case Raises an Important Question Concerning a Party's Ability to Challenge Erroneous Findings of Waiver of the Attorney-Client Privilege in the Federal Courts.

### A. The application of *Cohen*'s collateral order doctrine is an important matter, which this Court regularly addresses.

Collateral order is a practical construction of the final judgment rule (28 U.S.C. § 1291), applied in a myriad of contexts. The Court frequently grants certiorari on questions regarding *Cohen*'s application to various classes of orders. *E.g.*, *Johnson v. Jones*, 515 U.S. 304, 307 (1995) ("This case concerns government officials . . . who seek an immediate appeal of a district court order denying their motions for summary judgment."); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994) ("This case raises the question whether an order vacating a dismissal predicated on the parties' settlement agreement is final as a collateral order even without a district court's resolution of the underlying cause of action."). Indeed, the Court has even raised the issue *sua sponte*. *Will v. Hallock*, 545 U.S. 1103 (2005) (granting certiorari; "[i]n addition to the Question presented by the petition, the parties are directed to brief and argue the following Question: 'Did the Court of Appeals have jurisdiction over the interlocutory appeal of the District Court's order. . . .'") *vacated by* 546 U.S. 345 (2006). These grants illustrate the importance of *Cohen* questions per se—importance that is multiplied when the decisions of the courts of appeals are in conflict.

### B. The critical importance of the attorney-client privilege to the legal system warrants consideration of this issue by the Court.

The Court should also grant this Petition because of the essential role the attorney-client privilege plays in the American legal system. Every jurisdiction in the country recognizes the attorney-client privilege as a means to advance "the broader public interests in the observance of law and administration of justice." *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Court has repeatedly recognized the importance of the attorney-client privilege in our judicial system. *See id; Commodity Futures Trading Comm'n. v. Weintraub*, 471 U.S. 343, 348 (1985) (attorney-client privilege "encourages observance of the law and aids in the administration of justice"). In our representational system, fostering open and frank communication between attorney and client is paramount not only to the vigorous and effective representation of the client's interest, but also to the administration of our system of public justice. *See Upjohn*, 449 U.S. at 389.

Further, it is important that the Court continue to protect privileged communications that arise during the course of an internal investigation. In *Upjohn*, the Court held that a narrowly defined attorney-client privilege would "threate[n] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* at 392. In so holding, the Court rejected the Government's argument that "civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege." *Id.* at 393 n.2. Instead, the Court reasoned that the Government's argument "ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken." *Id.*

In the context of waiver of the attorney-client privilege, the issue has recently come to the forefront. Congress has been actively legislating to correct perceived overreaching by Government prosecutors pressuring companies to waive attorney-client privilege—overreaching damaging to voluntary compliance with the law. *See* Attorney-Client Privilege Act of 2007, H.R. 3013, 110th Cong. § 2(a)(2) (as referred to Senate Comm. on the Judiciary Nov. 14, 2007) ("Protecting attorney-client privileged communications from compelled disclosure fosters voluntary compliance with the law."); *see also* Thompson Memorandum to United States Attorneys, Jan. 20, 2003 (considering "waiver of corporate attorney-client and work product protection" a "factor[] in reaching a decision as to the proper treatment of a corporate target"); McNulty Memorandum to United States Attorneys, Dec. 12, 2006 (superseding Thompson Memorandum; noting that "our practices may be discouraging full and candid communications between corporate employees and legal counsel," so the Department of Justice must "adjust certain aspects of [its] policy"); Filip letter to Sens. Leahy and Specter, July 9, 2008 (describing alterations in Department of Justice practices, including that "[c]ooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges"; urging Senate not to "pursu[e] legislation in this area").

Thus, the waiver issues present in this case, and the ability to challenge erroneous findings of waiver through collateral jurisdiction expand beyond the facts and parties to this case. The inability to challenge erroneous findings of waiver hinders the desired voluntary compliance by chilling internal investigations. The District Court's finding of waiver here based on three sentences in another case undermines the efforts of this Court, Congress, and the Department of Justice to protect privileged communications in an internal investigation.

Further, the direct conflict among the courts of appeals on the applicability of *Cohen* compounds the importance of the question presented. And the importance of this issue goes beyond the parties to this case, and beyond the desired voluntary compliance in internal investigations, but instead expands to every litigant faced with an adverse finding of waiver or ordered to produce privileged information. The attorney-client privilege and a party's right to correct erroneous findings of waiver of that privilege demands the same protection in all federal courts.

## C. Other avenues of review are insufficient to protect the attorney-client privilege.

Without a direct appeal under the collateral order doctrine there are no adequate means available to correct an erroneous finding of waiver of privilege.

### 1. Mandamus is not an effective means of review.

As some circuits have noted, one possible method of obtaining review is to petition for writ of mandamus. This is an inadequate alternative, however, because the standard of review under a writ of mandamus is heavily weighted against the moving party and does not permit the appellate court to correct error by the lower court except in highly unique and extraordinary circumstances. Mandamus jurisdiction affords an appellate court less opportunity to correct district court error in the case before it and less opportunity to produce guidance for future cases. *Ford*, 110 F.3d at 904.

Unquestionably, mandamus presents a significantly limited standard of review. This Court "ha[s] held that only 'exceptional circumstances amounting to a judicial "usurpation of power" will justify issuance of the writ' " and that "the party seeking mandamus has the 'burden of showing that its right to issuance of the writ is "clear and indisputable".' " *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967) and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). Thus, even erroneous findings that a party waived the attorney-client privilege will be routinely affirmed with a cursory analysis based on mandamus's "stringent standard." *Id.* at 289; *see Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 (1978) (plurality opinion) ("Although the District Court's exercise of its discretion may be subject to review and modification in a proper interlocutory appeal, we are convinced that it ought not to be overridden by a writ of mandamus." (citation omitted)); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18 (1983) (noting that *Calvert* plurality "concluded that the movant . . . had failed to meet [the mandamus] burden" but "that the movant might have succeeded on a proper appeal").

While the standard of review on a direct appeal varies depending on the issue presented for review, it is in any case less stringent than mandamus. Given the important distinction between mandamus and direct appeal, this Court often takes collateral order cases even though mandamus is proposed as an alternative. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714-15 (1996); *Moses H. Cone*, 460 U.S. at 8-11; *see also Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (holding that denial of motion to dismiss on Speech and Debate Clause grounds can be directly appealed).

### 2. Failing to comply with the order and obtaining a contempt citation is not a valid means of review.

Another possible method of review is for a party to refuse to comply with the order and then await a contempt citation. This is the preferred method in some circuits, as noted above.

Contempt, however, is not always an available avenue to appeal. In the Eleventh Circuit, for example, a party may seek an immediate appeal of an order of contempt only if the sanction is criminal in nature. *See, e.g., Combs v. Ryan's Coal Co.*, 785 F.2d 970, 976 (11th Cir. 1986) (noting that "[g]enerally a finding of civil contempt is not reviewable on interlocutory appeal"). Setting aside the inherent public policy implications of encouraging contempt as a means to proper appellate review, there is no reasonable manner to predict that a party will receive a criminal contempt citation. To the contrary, a district court is free to sanction defiance of its orders by civil contempt, by the striking of pleadings, or by other means that cannot be appealed until a final judgment is entered. Thus, forcing a party to gamble that a court will impose the "right" kind of sanction fails to afford the party a reliable means of appeal:

> The disobedience and contempt route to appeal cannot be labeled an adequate means of relief for a party-litigant. . . . Petitioner cannot know, ex ante, whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order. The uncertainty of this means to relief bespeaks its inadequacy in this case.

*In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (quoting 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3914.23 at 146 (2d ed. 1992)). Awaiting a contempt citation is therefore an unrealistic, impractical, and unnecessarily risky method of obtaining appellate review, particularly to protect attorney-client privileged communications.

## III. The District Court's Order Is Appealable Under the Collateral Order Doctrine.

Under *Cohen*, a district court's order is appealable absent final judgment if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). As multiple courts of appeals have held, a district court order implicating attorney-client privilege, such as the challenged order in this case, meets the *Cohen* test. *Ford*, 110 F.3d 954; *Philip Morris*, 314 F.3d 612; *In re Napster*, 479 F.3d 1078. The Eleventh Circuit erroneously declined to permit Mohawk's appeal under *Cohen*.

### A. The District Court's October 1, 2007 Order Conclusively Determined the Privilege Question.

The first *Cohen* prong is whether the order from which the appellant appeals conclusively determines the disputed question. *See Sell v. United States*, 539 U.S. 166, 176 (2003). The Eleventh Circuit correctly agreed that the first prong is satisfied in this case. In so holding, the Eleventh Circuit stated that the challenged discovery order "leaves no room for the district court to further consider whether the information at issue is protected." Appendix A, p. 8a.

### B. The District Court's October 1, 2007 Order Resolved an Important Issue that is Separate from the Merits.

The second *Cohen* prong is whether the order resolves an important issue that is completely separate from the merits of the dispute. *See Sell*, 539 U.S. at 176. This breaks into two components: importance and separateness. The Eleventh Circuit acknowledged that this prong is satisfied in this case, stating "we agree that the attorney-client privilege is important and that the district court can resolve the privilege issues (i.e., whether Appellant must produce the disputed documents and communications) without deciding the merits of the case." Appendix A, p. 8a.

#### 1. The Attorney-Client Privilege is Important under the *Cohen* test.

Focusing first on the element of importance, there is no question that issues involving waiver of the attorney-client privilege are important under *Cohen*. The *Ford* court, after a thorough analysis of the case law tracing this Court's treatment of the "importance" factor of the *Cohen* test, determined that the attorney-client privilege satisfied that factor. It held that:

> The interests protected by the privilege are significant relative to the interests advanced by adherence to the final judgment rule. It is often stated that the attorney-client privilege is at the heart of the adversary system; its purpose is to support that system by

> promoting loyalty and trust between an attorney and a client.

110 F.3d. at 961. Thus, the Third Circuit held that the attorney-client privilege is "important" under the *Cohen* test, further stating:

> . . . the attorney-client privilege is thus important in the *Cohen* sense; the status or relationship, deeply embedded in our legal culture, is of sufficient importance that the danger of denying justice by delay in appellate adjudication (which would result in irremediable disclosure of privileged material) outweighs the inefficiencies introduced by immediate appeal.

*Id.* at 962. Given its fundamental significance to the judicial process, the issue of attorney-client privilege easily satisfies the "importance" element of the *Cohen* test.

### 2. The Privilege Issues are Separate from the Merits.

The second element of this prong also requires that the issue on appeal be separate from the merits. *See Sell*, 539 U.S. at 176. In this case, the privilege issues are separate from the merits. For example, Respondent alleges primarily that he was threatened in violation of 42 U.S.C. § 1985(2). He contends Mohawk conspired to and threatened him, and ultimately terminated him to deter him from testifying in the *Williams* case. Indeed, the court can resolve the underlying privilege issues (i.e., whether documents and communications should be produced) without even discussing the merits of the case (i.e., whether Mohawk's alleged conduct constitutes a violation of the statute). The Eleventh Circuit agreed. Appendix A, p. 8a.

### C. The October 1, 2007 Order is Effectively Unreviewable after Final Judgment.

Finally, the third prong of the *Cohen* test is satisfied here and the Eleventh Circuit reached an erroneous conclusion in holding Mohawk's claim of privilege was otherwise "reviewable." This prong requires that the order from the District Court be "'effectively unreviewable on appeal from a final judgment.'" *See Sell*, 539 U.S. at 176. This Court has held that an order is "effectively unreviewable" when the order affects "rights that will be *irretrievably lost* in the absence of an immediate appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985) (emphasis added).

An appeal at the end of this case cannot remedy the breach of confidentiality that will unavoidably occur as a result of the mandated disclosure of privileged materials and communications. The disclosure would cause Mohawk irreparable harm as the information protected by the privilege could be lost forever if Mohawk was forced to wait until the end of the case to seek appellate review. If Mohawk is forced to wait for appellate review, Respondent, his lawyers, and perhaps others will already have had access to the privileged information, negating any protection that could be put back in place by a later appeal. Respondent seeks to uncover the legal advice of both Mohawk's General Counsel and its outside litigation counsel. Once these privileged communications are disclosed, they can never be fully retrieved. At that point in time, any issue of privilege would effectively be moot. *See Philip Morris*, 314 F.3d at 619.

The Eleventh Circuit's flawed analysis of *Cohen*'s third prong stems from an erroneous view that privileged communications between attorney and client merely contain facts to be used at trial. On that view, any erroneous finding of waiver can be cured by appeal after final judgment; the appellate court can reverse the judgment and remand for retrial without use of the privileged material. *See* Appendix A, pp. 8a-9a. ("we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information"). The view is erroneous because, while privileged communications often contain facts – facts the opposing party has alternative avenues to discover – attorney-client communications also contain the attorney's legal conclusions and litigation strategies. It is these mental impressions that cannot be recovered after final appeal. Without interlocutory appeal, an erroneous finding of waiver will allow opposing counsel to proceed "on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J. concurring).

Further, the Eleventh Circuit inappropriately treated the privileged information like any ordinarily discoverable information. While information may be discoverable, its wrongful admission in evidence can be corrected through an appeal and new trial, if appropriate. But this is not of great concern because the parties were entitled to that information in the first instance through lawful discovery under Rule 26. Privileged information, however, is not discoverable and opposing counsel and parties never had any entitlement to the privileged information in the first place. The unfair advantage gained from their access to that information cannot be avoided absent an immediate appeal.

The District Court's Order is final, the attorney-client privilege issues are both important and separate from the merits of the case, and Mohawk has no effective way to appeal later. Once the privileged documents and communications are produced to Respondent, the benefit of the attorney-client privilege is irretrievably lost. Given these circumstances, collateral order jurisdiction is appropriate.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this Petition. This Court should grant the Petition to resolve the conflict among the courts of appeals as to whether a district court's discovery order finding waiver of the attorney-client privilege and compelling production of privileged information is immediately appealable under the collateral order doctrine.

Respectfully submitted,

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# APPENDIX

# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 26, 2008

## IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-15208-GG

D.C. Docket No. 07-00049-CV-HLM-4

NORMAN CARPENTER,

Plaintiff-Appellee,

versus

MOHAWK INDUSTRIES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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No. 07-15691-GG

IN RE:

MOHAWK INDUSTRIES, INC.,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Georgia.

Before CARNES and MARCUS, Circuit Judges, and BUCKLEW,* District Judge.

PER CURIAM:

Before the Court are the following: (1) Appellant's appeal of a district court's order granting Appellee's motion to compel responses and produce documents Appellant contends are protected by the attorney-client privilege; (2) Appellant's companion petition for writ of mandamus seeking to compel the district court judge to vacate the order as it relates to the motion to compel; and (3) Appellee's motion to dismiss the appeal for lack of jurisdiction. After review and oral argument, we conclude that this Court should decline to extend the "collateral order" doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), to the exercise of this Court's jurisdiction over an interlocutory appeal of a discovery order implicating the attorney-client privilege. Additionally, with respect to Appellant's companion petition for writ of mandamus, we conclude that Appellant has not shown that its "right to issuance of the writ is 'clear and indisputable.' " *In re Lopez-Lukis*, 113 F.3d 1187, 1188 (11th Cir.1997) (citing *Kerr v. U.S. Dist. Court for the Northern Dist. of California*, 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976)). Accordingly, we dismiss Appellant's appeal for lack of jurisdiction and deny Appellant's petition for writ of mandamus.

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* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

## I. Background

Plaintiff/Appellee Norman Carpenter ("Appellee") initiated this action on March 15, 2007 in the United States District Court for the Northern District of Georgia against Defendant/Appellant Mohawk Industries, Inc. ("Mohawk" or "Appellant"), and also against various employees of Mohawk Industries, Inc., alleging that he was terminated in violation of 42 U.S.C. § 1985(2) and various Georgia laws. Specifically, Appellee contends in his complaint that he reported to Mohawk's human resources department that several temporary employees, hired by Mohawk through a temporary employment agency, were illegal aliens. After making his report, Appellee was required to meet with attorney Juan P. Morillo, who represents Mohawk in a separate lawsuit, *Williams v. Mohawk Industries, Inc.*, Civil Action File No. 4:04-cv-0003-HLM.[1]

Appellee alleges that the meeting between him and attorney Juan P. Morillo was designed to coerce him into recanting his report, which Appellant knew would be damaging to its defense in the *Williams* action. Appellee refused to recant his report, and he was terminated the day after the meeting. Appellant's stated reason for terminating Appellee was because it had discovered that

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[1] In the *Williams* lawsuit, a group of current and former Mohawk employees filed a class action lawsuit against Mohawk in the District Court for the Northern District of Georgia, alleging that Mohawk conspired to place illegal aliens to work, in violation of federal and state RICO laws.

Appellee was committing immigration crimes by harboring illegal aliens.

After learning about Appellee's complaint, the plaintiffs in the *Williams* action filed an emergency motion for an evidentiary hearing, to which Mohawk's counsel in the *Williams* action filed a response. The response stated, in relevant part:

> Plaintiffs admit that the only basis for their Motion are the allegations in the complaint filed two weeks ago in *Carpenter v. Mohawk Industries.* Plaintiffs have never spoken to Mr. Carpenter, and they have not produced any other evidence corroborating his allegations. Nor could they. As his own statements demonstrate, Mr. Carpenter's wild allegations that he was fired because of some conspiracy to influence his testimony are pure fantasy. The true facts are these. On June 1, 2006, Mohawk hired Mr. Carpenter as a Shift Supervisor at Mohawk's Union Grove manufacturing facility. Mr. Carpenter was hired as a salaried employee, and his responsibilities included the supervision of hourly Mohawk employees. Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct . . . . Mr. Carpenter's attempt to have Mohawk send a worker that Mr. Carpenter believed to be unauthorized to a temporary agency was a clear violation of Mohawk's Code of Ethics

> and an attempt to circumvent federal immigration law.
>
> . . .
>
> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.
>
> As a result of Mr. Carpenter's misconduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.[2]

After engaging in some initial discovery exchanges in the instant case, Appellee filed a motion to compel responses to both his interrogatories and document requests, seeking information Appellant contended was protected by the attorney-client privilege. Specifically,

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[2] *Williams v. Mohawk Indus., Inc.*, Civil Action File No. 4:04-cv-0003-HLM, Docket Entry No. 94, at 4-5 (citations omitted).

Appellee sought information related to his communications with Attorney Juan P. Morillo and information related to Appellant's decision to terminate Appellee. The district court found that the communications at issue were protected by the attorney-client privilege, but it went on to conclude that Appellant had implicitly waived the attorney-client privilege due to the response Appellant filed in the *Williams* action. The district court stated that:

> By making those representations, Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment.

The district court then ordered Appellant to respond to Appellee's interrogatories and document production requests, but it stayed that portion of its order if Appellant chose to appeal.

Appellant, believing that it had not waived the attorney-client privilege and not wanting to turn over the information at issue, challenges the district court's order in this appeal. Appellee has moved to dismiss the appeal on the basis that this Court lacks jurisdiction to consider the appeal of a non-final discovery order. Appellant has also filed a petition for a writ of mandamus, seeking to compel the district court judge to vacate the order as it relates to Appellee's motion to compel. We consolidated the appeal, motion to dismiss, and petition for a writ of mandamus and will, therefore, consider them together.

## II. Motion to Dismiss–Jurisdiction

As an initial matter, we must address this Court's jurisdiction to review Appellant's claims by way of interlocutory appeal. Generally, discovery orders are not final orders of the district court for purposes of obtaining appellate jurisdiction under 28 U.S.C. § 1291. A final decision is one that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1338 (11th Cir.2007) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994)). Therefore, discovery orders are normally not immediately appealable. *See Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp.*, 680 F.2d 743, 745 (11th Cir.1982). However, the collateral order doctrine, established by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), provides an exception to the finality requirement of 28 U.S.C. § 1291. Under *Cohen*, an order is appealable if it

(1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

Appellant argues that the challenged discovery order is an appealable "collateral order" under *Cohen*, because all three prongs of the *Cohen* test are met. We conclude that the challenged discovery order meets the first and second prongs of the relevant test. The district court's order requiring Appellant to produce the disputed information leaves no room for the district court to further consider whether the information at issue is protected. As for the second prong, we agree that the attorney-client privilege is important and that the district court can resolve the privilege issues (*i.e.*, whether Appellant must produce the disputed documents and communications) without deciding the merits of the case.

As for the third prong, however, we do not find that a discovery order that implicates the attorney-client privilege is effectively unreviewable on appeal from a final judgment. If this Court were to determine on appeal from a final judgment that privileged information was wrongly turned over and was used to the detriment of the party asserting the privilege, we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information.

This circuit has previously held that discovery orders are not appealable. *See In re Int'l Horizons, Inc.*, 689 F.2d 996, 1000-01 (11th Cir.1982); *Rouse Constr. Int'l, Inc.*, 680 F.2d at 743 (11th Cir.1982). "Ordinarily, a litigant seeking to overturn a discovery order has (only) two choices. Either he can comply with the order and challenge it at the conclusion of the case or he can refuse to comply with the order and contest its validity if subsequently cited for contempt for his refusal to obey." *Rouse Constr. Int'l Inc.*, 680 F.2d at 745. Indeed, in *International Horizons* we found that the defendant could not appeal the district court's order requiring the defendant to disclose documents that the defendant argued were protected by the accountant-client privilege. *In re Int'l Horizons, Inc.*, 689 F.2d at 1001.

This circuit has not, however, directly addressed the question of whether a discovery order compelling the disclosure of information claimed to be protected by the attorney-client privilege can be appealed before final judgment under *Cohen*. A number of circuits have addressed the issue, and there are decisions on both sides. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1087-89 (9th Cir.2007) (finding jurisdiction under the collateral order doctrine to review the district court's order compelling production of attorney-client communication); *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617-21 (D.C.Cir.2003) (same); *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 458 & n. 2 (1st Cir.2000)

("[D]iscovery orders generally are not thought to come within [the collateral order doctrine]"; the "perfect example" of a discovery order that is not appealable under the collateral order doctrine is one involving a party's claim of attorney-client privilege.); *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir.1997) ("[T]he strictures of the collateral order doctrine have been met in this case, and we have jurisdiction over the appeal."); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir.1993) (declining to accept jurisdiction, and stating that "in virtually every case in other circuits involving similar attorney-client privilege claims, the courts have refused to take jurisdiction."); *Texaco Inc. v. Louisiana Land and Exploration Co.*, 995 F.2d 43, 44 (5th Cir.1993) (order requiring plaintiff to produce certain documents that it claimed were subject to attorney-client privilege was not appealable under the collateral order doctrine); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir.1992) (pretrial discovery orders are not appealable under the collateral order doctrine); *Reise v. Bd. of Regents of Univ. of Wisconsin Sys.*, 957 F.2d 293, 295 (7th Cir.1992) ("[O]rders to produce information over strong objections based on privilege are not appealable."); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed.Cir.1991) (order compelling discovery of attorney opinion letters was not immediately appealable under the collateral order doctrine).

We conclude that the challenged discovery order is not an appealable collateral order under *Cohen*. There appears to this Court to be no clear distinction between the interlocutory appeal of a discovery order implicating the attorney-client privilege and an interlocutory appeal of a discovery order implicating the accountant-client privilege, and this Court has previously held that the latter is not appealable. *See In re Int'l Horizons, Inc.* 689 F.2d 996 (11th Cir.1982). Further, we are not persuaded by Appellant's argument that once the privileged material is turned over, the "cat is out of the bag" and the damage is done.

This Court has never exercised jurisdiction under the collateral order doctrine to review any discovery order involving any privilege. Rather, "mandamus is often an appropriate method of review of orders compelling discovery." *In re Fink*, 876 F.2d 84, 84 (11th Cir.1989). We have explained:

> In the context of discovery orders which will compromise a claim of privilege or invasion of privacy rights, mandamus has been found appropriate due to the importance of the privilege, the seriousness of the injury if discovery is obtained, and the difficulty of obtaining effective review once the privileged information has been made public.

*In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir.2003) (quoting *In re Fink*, 876 F.2d at 84). Similarly, other Circuits have denied collateral order review of discovery orders denying a claim of privilege, and instead, those Circuits state that mandamus review is the appropriate avenue for immediate review, although mandamus relief is an extraordinary remedy. *See In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568 (5th Cir.2006) (stating that "[m]andamus is appropriate if the district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal"); *Simmons v. City of Racine, PFC*, 37 F.3d 325, 327, 328-29 (7th Cir.1994) (explaining that the court lacked jurisdiction over an appeal of a discovery order compelling the production of documents allegedly protected by privilege, but stating that the appellants could "obtain immediate review of an adverse discovery order by other means[,]" including petitioning the court for a writ of mandamus); *Boughton*, 10 F.3d at 750-51 (holding that an order compelling production of information allegedly protected by the attorney-client privilege was not appealable under the collateral order doctrine and, instead, analyzing whether the order could be vacated under a writ of mandamus); *Chase Manhattan Bank*, 964 F.2d at 163 (rejecting the application of the collateral order doctrine in an appeal from a discovery order that required disclosure of documents allegedly protected by the attorney-client privilege, and instead, overturning the discovery order through a writ of mandamus); *see also United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 444 F.3d 462, 473 (6th Cir.2006) (refusing to determine the applicability of the collateral order doctrine to a challenge of a discovery order's finding relating to the attorney-client privilege, in part, because the court had "traditionally viewed mandamus as the sole method by which [an appellate court] might review a discovery order involving a claim of privilege").

Further, utilizing the writ of mandamus, which places a higher burden on the challenging party than a direct appeal, as the appropriate vehicle to hear challenges to discovery disputes grounded in the attorney-client privilege is desirable. A potentially large volume of appeals may arise out of such discovery orders, and thus, there are powerful prudential reasons to avoid commonplace interlocutory appeals. Utilizing the writ of mandamus, as opposed to the collateral order doctrine, as the appropriate avenue to seek review of discovery orders involving claims of privilege strikes an appropriate balance between the concerns of furthering the important policies of full and frank communication sought to be furthered by the privilege and the concerns of judicial efficiency.

Furthermore, another avenue of review *may* exist if the party challenging the discovery order refuses to comply with the order and contests its validity after being cited for contempt. However, we note that contempt orders resulting from discovery disputes are not appealable final orders unless the contempt order imposes "a fine or penalty . . . that may not be avoided by some other form of compliance." *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 976 (11th Cir.1986). Thus, in order for the contempt order to be immediately appealable, "[t]here must be *both* a finding of contempt and a *noncontingent* order of sanction." *Id.* at 977; *see also William J. Doyle v. London Guar. & Accident Co. Ltd.*, 204 U.S. 599, 604-05, 27 S.Ct. 313, 51 L.Ed. 641 (1907); *S.E.C. v. Kirkland*, 533 F.3d 1323, 1324 (11th Cir.2008).

Accordingly, we hold that the instant appeal is not permissible under the *Cohen* exception and note that there are other possible avenues for immediate review. Therefore, we grant Appellee's motion to dismiss the appeal.

## III. Mandamus

Having granted Appellee's motion to dismiss the appeal, the Court turns to Mohawk's petition for writ of mandamus. Mandamus is an extraordinary remedy, and it is appropriate only when "no other adequate means are available to remedy a clear usurpation of power or abuse of discretion by the district court." *In re Loudermilch*, 158 F.3d 1143, 1144 (11th Cir.1998). The petitioner seeking the writ carries the burden of showing that its "right to the issuance of the writ is 'clear and indisputable.'" *In re Lopez-Lukis*, 113 F.3d at 1188. A writ will not issue "merely because [the petitioner] shows evidence that, on appeal, would warrant reversal of the district court." *In re Bellsouth Corp.*, 334 F.3d at 953. A district court's discovery orders are reviewed for an abuse of discretion. *See In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir.2003). A clear error of judgment or application of an incorrect legal standard is an abuse of discretion. *See Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1326 (11th Cir.2000).

Here, Mohawk seeks a writ of mandamus directing the district judge to vacate the part of his order finding that Mohawk implicitly waived its attorney-client privilege, and directing the district court not to compel

Mohawk to produce the disputed information. Even if we were to conclude that the district court had erred in finding that Mohawk waived the attorney-client privilege, Mohawk still has not shown that its right to the issuance of the writ is clear and indisputable. *In re Lopez-Lukis*, 113 F.3d at 1188. Mandamus is appropriate only when there has been a clear usurpation of power or abuse of discretion, and Mohawk has not shown that either occurred here. *In re Loudermilch*, 158 F.3d at 1144.

This appeal is DISMISSED for lack of jurisdiction, and Mohawk's petition for writ of mandamus is DENIED.

# APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION FILED OCTOBER 1, 2007

## IN THE UNITED STATES DISTRICT COURT
## FOR THE NORTHERN DISTRICT OF GEORGIA
## ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-0049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC.,
PATRICIA SILVERS,
JEFFREY BRIGGS, and
SCOTT HIGGINS,

Defendants.

## ORDER

This case is before the Court on Plaintiff's Motion to Compel Responses to Plaintiff's First Interrogatories and Request to Produce Documents that Mohawk Contends Are Protected By the Attorney-Client Privilege [31], and on Defendant Mohawk Industries, Inc.'s ("Defendant Mohawk's") Motion for Protective Order [32].

*Appendix B*

## I. Background

On March 15, 2007, Plaintiff filed this lawsuit. Plaintiff alleges that Defendant Mohawk fired him after he sent an email to one of its Human Resources ("HR") representatives advising that a large percentage of the individuals sent by a temporary agency to work for Defendant Mohawk lacked either a valid Georgia ID or proper INS papers. According to Plaintiff, the HR representative passed on the message to top officials with Defendant Mohawk, including the head of Defendant Mohawk's HR and Defendant Mohawk's general counsel, Salvatore J. Perillo.

Plaintiff alleges that Defendant Mohawk's litigation counsel in *Williams v. Mohawk Industries, Inc.*, Civil Action File No. 4:04-CV-0003-HLM (the "*Williams* Action") met with him and attempted to intimidate him into changing his story because it would damage Defendant Mohawk in the *Williams* Action. According to Plaintiff, when Attorney Morillo and Defendant Mohawk learned that he would not change his story, Defendant Mohawk fired Plaintiff.

Plaintiff has sued Defendant Mohawk and several of its top executives, including Defendant Patricia Silvers, the highest-ranking HR executive in Defendant Mohawk's Calhoun, Georgia, division, Defendant Scott Higgins, a plant manager and Plaintiff's direct supervisor, and Defendant Jeffrey Briggs, a vice president of Defendant Mohawk and Defendant Higgins' direct supervisor, alleging a claim of conspiracy under 42 U.S.C.A. § 1985(2).

On March 21, 2007, the plaintiffs in the *Williams* Action filed an Emergency Motion for Evidentiary Hearing Regarding Mohawk's Contact With Witnesses ("Motion for Evidentiary Hearing"). On March 30, 2007, counsel for Defendant Mohawk and counsel for Plaintiff filed responses to the Motion for Evidentiary Hearing in the *Williams* Action. The response filed on behalf of Defendant Mohawk stated, in relevant part:

> Plaintiffs admit that the only basis for their Motion are the allegations in the complaint filed two weeks ago in [the instant action]. Plaintiffs have never spoken to Mr. Carpenter, and they have not produced any other evidence corroborating his allegations. Nor could they. As his own statements demonstrate, Mr. Carpenter's wild allegations that he was fired because of some conspiracy to influence his testimony are pure fantasy. The true facts are these. On June 1, 2006, Mohawk hired Mr. Carpenter as a Shift Supervisor at Mohawk's Union Grove manufacturing facility. Mr. Carpenter was hired as a salaried employee, and his responsibilities included the supervision of hourly Mohawk employees. Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct. . . . Mr. Carpenter's attempt to have Mohawk send a worker that Mr. Carpenter believed to be unauthorized to a temporary agency was a

> clear violation of Mohawk's Code of Ethics and an attempt to circumvent federal immigration law.

*Williams* Action, Docket Entry No. 94, at 4-5 (citations omitted). The response further stated:

> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.
>
> As a result of Mr. Carpenter's misconduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.

*Id.* at 6-7. Counsel for Defendants in the instant case also filed a response to the Motion for Evidentiary Hearing in the *Williams* Action. *Williams* Action, Docket Entry No. 91.

Plaintiff later filed a supplemental response to the Motion for Evidentiary Hearing in the *Williams* action. In support of that response, Plaintiff submitted a declaration from Christina Martinez, who was an hourly employee with Defendant Mohawk. In her declaration, Ms. Martinez stated that she was instructed to speak with Attorney Morillo. (Decl. of Christina Martinez ¶ 7.) According to Ms. Martinez, Attorney Morillo asked her whether she had information about certain employees and their work status, and Ms. Martinez confirmed her understanding that the employees did not have correct paperwork. (*Id.*) Shortly after the meeting, according to Ms. Martinez, Defendant Silver, Becky Hale, an HR employee for Defendant Mohawk and Kirk Prather, another HR representative for Defendant Mohawk, approached Ms. Martinez and instructed her to go into a conference room. (*Id.* ¶ 8.) According to Ms. Martinez, Defendant Silver told Ms. Martinez that she should not be seeking information about the work status of employees, as that was HR's job, and that, if she did so again, it could cost her her job. (*Id.*)

Further, Ms. Martinez stated that in March 2007, a co-worker showed her a news report about this action. (Martinez Decl. ¶ 9.) According to Ms. Martinez, when her Team Leader saw her with the article, she was instructed to put the article away and was told that if she was caught talking about this case, she could lose her job. (*Id.*) Ms. Martinez further alleged that since the filing of this action, Mohawk's management had followed her and intimidated her, which caused her to fear that she would be terminated if she shared her knowledge about the allegations in the *Williams* Action and in this action. (*Id.* ¶¶ 10-11.)

On April 9, 2007, the Court entered an Order denying the Motion for Evidentiary Hearing. *Williams v. Mohawk Indus., Inc.*, Civil Action File No. 4:04-CV-0003-HLM (N.D. Ga. Apr. 9, 2007) (unpublished). The Court found, among other things, that the Motion was premature and that the plaintiffs in the *Williams* Action had not fulfilled their obligations to obtain the extraordinary remedy that they requested. *Id.*, slip op. at 29-30. The Court further stated:

> Instead, Plaintiffs should attempt to obtain more information to support their allegations, and Plaintiffs can do so through the normal discovery process. Indeed, if necessary, Plaintiffs can subpoena Mr. Carpenter and Ms. Martinez for depositions in this action. After obtaining those depositions, Plaintiffs may, if necessary, re-submit their Motion for Evidentiary Hearing, along with the deposition transcripts. At that point, Plaintiffs should have developed the record enough to allow the Court to determine whether holding an evidentiary hearing[] is appropriate. Alternatively, Plaintiffs may choose to allow the discovery process in the *Carpenter* case to proceed normally, and to request that the Court take action after that discovery uncovers relevant

> information. For those reasons, the Court denies without prejudice Plaintiff[s'] Motion for Evidentiary Hearing.

*Id.* at 30-31 (footnotes omitted).

On August 29, 2007, Plaintiff filed his Motion to Compel Responses to Plaintiff's First Interrogatories and Request to Produce Documents that Mohawk Contends Are Protected By the Attorney-Client Privilege. On that same day, Defendant Mohawk filed its Motion for Protective Order. The briefing process for those Motions is complete, and the Court therefore concludes that the Motions are ripe for resolution by the Court.

## II. Defendant Mohawk's Motion for Protective Order

Defendant Mohawk has filed a Motion for Protective Order. In its Motion, Defendant Mohawk requests that the Court issue an Order establishing: (1) "[t]hat by asking questions of Mr. Carpenter and Ms. Martinez about their communications with Mohawk's outside counsel, Mohawk will not be deemed to have waived the attorney-client privilege;" instead, Defendant Mohawk will reserve its right to assert the privilege in the future, and Plaintiff will reserve the right to argue waiver based on Defendant Mohawk's prior acts; and (2) "[t]hat the attendance at these depositions be limited to the witnesses testifying and counsel for the parties in this case, with the parties then afforded the opportunity to designate the depositions, or portions thereof, under the terms of a Protective Order." (Docket Entry No. 32-1 at 1-2.) The Court addresses Defendant Mohawk's requests in turn.

### A. Waiver

The Court cannot determine at this point, without knowing what questions Defendant Mohawk plans to ask of Plaintiff and Ms. Martinez, whether Defendant Mohawk will waive the attorney-client privilege by inquiring into communications between those individuals and Attorney Morillo.[1] It is conceivable that some questions might put the communications in issue so that Defendant Mohawk might be considered to have waived the privilege with respect to those communications.[2] For that reason, the Court is not inclined to enter an Order providing generally that Defendant Mohawk will not waive the attorney-client privilege by inquiring into those areas during the depositions of Plaintiff and Ms. Martinez. It is incumbent upon Defendant Mohawk, not the Court, to research this issue and arrive at its own decision as to whether to move forward with those questions. Indeed, if the Court issued the Order requested by Defendant Mohawk, the Court effectively would be issuing an advisory opinion, which the Court cannot do. The Court therefore denies this portion of Defendant Mohawk's Motion for Protective Order.

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[1] The Court is well aware that Plaintiff and the plaintiffs in the *Williams* Action contend that Defendant Mohawk already has waived the attorney-client privilege by making prior representations. The Court addresses those contentions *infra* Part III.

[2] The Court, of course, does not intend to express an opinion as to which type of questions would result in a waiver of the privilege.

### B. Request for Entry of Protective Order Attached to Defendant Mohawk's Motion

Defendant Mohawk has attached a proposed protective order to its Motion for Protective Order that is significantly broader than the protective order requested, and discussed, in Defendant Mohawk's Motion for Protective Order. Plaintiff has objected to the entry of that protective order.

Federal Rule of Civil Procedure 26(c) governs the entry of protective orders, and provides:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, for matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in said envelopes to be opened as directed by the court.

Fed. R. Civ. P. 26(c). "While Rule 26(c) articulates a single standard for ruling on a protective order motion, that of 'good cause,' the federal courts have superimposed a somewhat more demanding balancing of interests approach to the Rule." *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). "This standard requires the district court to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001).

The Court finds that Defendant Mohawk simply has not shown good cause to support the entry of the broad proposed protective order that it has attached to its Motion. Indeed, Defendant Mohawk does not even attempt to address many of the terms of that proposed protective order in its Motion. The Court therefore denies the Motion for Protective Order to the extent that Defendant Mohawk requests that the Court enter the proposed protective order attached as an exhibit to its Motion for Protective Order.

The Court recognizes, however, that Defendant Mohawk has a legitimate and significant interest in keeping the transcripts of the depositions confidential. Some of the questions and answers that will occur during the deposition likely will implicate attorney-client communications. Consequently, the Court directs the parties and counsel to file those depositions under seal with the Court, and to refrain from disclosing the depositions, or any portion thereof, until such time as the Court has occasion to address the issue of waiver in the context of the depositions. The Court will revisit the issue of disclosure of the depositions and sealing of the depositions after the Court addresses this waiver issue.

### C. Request for Entry of Protective Order Limiting Attendance at Depositions

Defendant Mohawk requests that the Court enter a protective order limiting attendance at the depositions of Plaintiff and Ms. Martinez to the parties and their counsel in the instant action. Essentially, Defendant Mohawk seeks to preclude the plaintiffs' counsel in the *Williams* Action from attending the depositions. The plaintiffs in the *Williams* Action and Plaintiff both oppose this request, arguing that the Court previously indicated an intent for discovery in both cases to overlap, and that interests of efficiency and judicial economy require that the depositions be taken only once.

The Court first observes that this case and the *Williams* Action are separate cases, and that the Court has not consolidated the cases for purposes of discovery or otherwise. Consequently, discovery in the cases ordinarily would proceed separately, unless counsel agreed to coordinate the discovery process for both cases. Counsel clearly are unable to agree to coordinate discovery in this case with discovery in the *Williams* Action.

Further, by issuing its April 9, 2007, Order in the *Williams* Action, the Court did not intend to authorize discovery in this action to proceed together with discovery in the *Williams* Action, or to allow plaintiffs' counsel in the *Williams* Action to participate in discovery in this case. Instead, the April 9, 2007, Order simply stated:

> Plaintiffs should attempt to obtain more information to support their allegations, and Plaintiffs can do so through the normal discovery process. Indeed, if necessary, Plaintiffs can subpoena Mr. Carpenter and Ms. Martinez for depositions in this action. After obtaining those depositions, Plaintiffs may, if necessary, re-submit their Motion for Evidentiary Hearing, along with the deposition transcripts. At this point, Plaintiffs should have developed the record enough to allow the Court to determine whether holding an evidentiary hearing is appropriate. Alternatively, Plaintiffs may choose to allow the discovery process in the *Carpenter* case to proceed normally, and to request that the Court take action after that discovery uncovers relevant information.

*Williams v. Mohawk Indus., Inc.*, Civil Action File No. 4:04 CV-0003-HLM (N.D. Ga. Apr. 9, 2007), *slip op.*. at 30-31 (footnotes omitted). By making the above statements in the April 9, 2007, Order, the Court simply indicated that the Williams Plaintiffs could choose either to: (1) take the depositions of Plaintiff Carpenter and Ms. Martinez in the *Williams* Action; or (2) allow discovery in the instant action to proceed normally and move for an evidentiary hearing after the conclusion of the discovery period. The Court did not authorize counsel for the plaintiffs in the *Williams* Action to participate in the discovery process in this action, and did not permit counsel for Plaintiff to participate in the discovery process in the *Williams* Action. Given Defendant Mohawk's legitimate and significant interest in protecting its attorney-client communications, and given the minimal, if any, prejudice to Plaintiff and Ms. Martinez that will occur from requiring those individuals to sit for two depositions, the Court finds that good cause exists to limit attendance at the depositions of Plaintiff and Ms. Martinez to those individuals, their counsel in this action, and the parties in this action. The Court therefore grants this portion of Defendant Mohawk's Motion for Protective Order.

## III. Motion to Compel

### A. Discovery Requests at Issue

In his Motion to Compel, Plaintiff requests that the Court order Defendant Mohawk "to respond to Plaintiff's First Interrogatory Nos. [sic] 4 and to produce all documents responsive to Plaintiff's First Request for Production Request Nos. 4, 6, 7, 12, 13, 14, 15, 32, 33, [and] 34." (Pl.'s Mot. Compel at 1.) In its brief, however, Plaintiff also apparently requests that the Court order Defendant Mohawk to respond to Interrogatories 1 and 3 of Plaintiff's First Interrogatories. (Pl.'s Br. Supp. Mot. Compel at 9-10.)

Ordinarily, the Court would address only the discovery requests listed in Plaintiff's Motion to Compel; however, rather than revisit this issue at a later date, the Court will address all of the discovery requests at this time.[3]

### 1. Interrogatory No. 1

Interrogatory No. 1 provides:

> Identify all individuals by name and job title who were involved in the decision to request that Carpenter be interviewed by Juan Morillo, Esq. ("Morillo"). "Involved" is defined as any individual who made the decision (whether or not jointly with one or more individuals), was conferred with in connection with the decision, reviewed the decision before it was implemented, or was informed of the decision before it was implemented.

Defendant Mohawk's response to Interrogatory No. 1 states:

> Mohawk objects to this interrogatory as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk responds

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[3] It is Plaintiff's burden to identify specifically and consistently which discovery requests are at issue in his Motion to Compel.

> as follows: Sal Perillo, former General Counsel to Mohawk.

### 2. Interrogatory No. 3

Interrogatory No. 3 states:

> Identify all individuals by name and job title who were involved in the decision to terminate Carpenter's employment with Mohawk. "Involved" is defined as any individual who made the decision (whether or not jointly with one or more individuals), was conferred with in connection with the decision, reviewed the decision before it was implemented, or was informed of the decision before it was implemented.

Defendant Mohawk's response to Interrogatory No. 3 provides:

> Mohawk objects to this interrogatory as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk responds as follows: Sal Perillo, Jerry Melton, Patti Silver and Juan Morillo.[4]

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[4] Defendant Mohawk's response does not provide the job title of Ms. Silver or Jerry Melton. This information clearly is not privileged. The Court directs Defendant Mohawk to supplement its response to provide this information if Defendant Mohawk has not done so already.

### 3. Interrogatory No. 4

Interrogatory No. 4 provides: "For each such person identified in Mohawk's response to Interrogatory No. 3, identify the specific role that person played in the decision referenced in Interrogatory No. 3." Defendant Mohawk responded: "Mohawk incorporates its response to Interrogatory No. 1."

### 4. Request for Production No. 4

Request for Production No. 4 demands that Defendant Mohawk produce: "[a]ll documents that constitute, reflect, reference or relate to Mohawk's decision to request that Carpenter be interviewed by Juan Morillo, Esq. ('Morillo')." Defendant Mohawk responded: "Mohawk objects to this request as it seeks information protected by the attorney client privilege and the attorney work product doctrine."

### 5. Request for Production No. 6

Request for Production No. 6 asks Defendant Mohawk to produce "[a]ll documents constituting, reflecting or relating to any communications from Morillo regarding his planned meeting or meeting with Carpenter." Defendant Mohawk responded: "Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the work product doctrine."

### 6. Request for Production No. 7

Request for Production No. 7 seeks "[a]ll documents that reference Morillo's meeting with Carpenter." Defendant Mohawk gave the following response:

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, and subject to the entry of a Protective Order.

### 7. Request for Production No. 12

Request for Production No. 12 demands production of "[a]ll notes taken during Morillo's meeting with Martinez." Defendant Mohawk responded: "Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine."

### 8. Request for Production No. 13

Request for Production No. 13 seeks "[a]ll documents that reference in any way Carpenter's email to Becky Hale ('Hale') sent on November 28, 2006 as identified in Paragraph 28 of Plaintiff's First Amended Complaint." Defendant Mohawk gave the following response:

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

### 9. Request for Production No. 14

Request for Production No. 14 demands production of "[a]ll documents that constitute, reflect, reference, support or relate to Mohawk's decision to terminate Carpenter's employment." Defendant Mohawk responded:

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

### 10. Request for Production No. 15

Request for Production No. 15 seeks "[a]ll documents constituting, reflecting or relating to any communications regarding Mohawk's decision to terminate Carpenter's employment." Defendant Mohawk's response to this Request states:

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

### 11. Request for Production No. 32

Request for Production No. 32 seeks to require Defendant Mohawk to produce "[a]ll documents that Mohawk claims support its conclusion(s) that formed the basis or bases for its decision to terminate Carpenter's employment." Defendant Mohawk responded: "Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, subject to the entry of a Protective Order."

### 12. Request for Production No. 33

Request for Production No. 33 seeks to require Defendant Mohawk to produce "[a]ll communications between a member of Mohawk's Legal Department and Morillo that reference Carpenter." Defendant Mohawk responded: "Mohawk objects to this request as it seeks information protected by the attorney-client privilege."

### 13. Request for Production No. 34

Request for Production No. 34 seeks "[a]ll communications between a member of Mohawk's Human Resources Department and Morillo that reference Carpenter." Defendant Mohawk's response states: "Mohawk objects to this request as it seeks information protected by the attorney-client privilege."

## B. Whether the Attorney-Client Privilege Applies

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Abdallah v. Coca-Cola Co.*, No. Civ. A. 1:98-CV-03679-RWS, 2000 WL 33249254, at *2 (N.D. Ga. Jan. 25, 2000). "'Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

> Stated generally, a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications with his or her attorney if:
>
> (1) the communications are between the attorney and the attorney's representative and the client or the client's representative;

> (2) the communications are strictly confidential; and
>
> (3) the communications are made in the furtherance of the rendition of legal services to the client or are reasonably necessary for the transmission of the communication.

*Burlington Indus., Inc. v. Rossville Yarn, Inc.*, No. Civ. A. 4:95-CV-0401-HLM, 1997 WL 404319, at *1 (N.D. Ga. June 3, 1997) (quoting Supreme Court Std. 503). The party asserting the attorney-client privilege bears the burden of demonstrating that the privilege applies. *Abdallah*, 2000 WL 33249254, at *3.[5]

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[5] The work product doctrine is set forth in Federal Rule of Civil Procedure 26(b)(3). That rule provides, in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing is made, the court shall protect against disclosure of the mental impressions,

(Cont'd)

## 1. Whether Attorney Morillo Acted In His Capacity as an Attorney

Plaintiff first contends that the attorney-client privilege does not apply because Attorney Morillo was not acting in his capacity as an attorney or providing

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(Cont'd)

> conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Rule 26(b)(3) thus provides "absolute protection" to "opinion" work product. *Burlington Indus., Inc.*, 1997 WL 404319, at *2.

The work product privilege only applies to documents prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3). A document is prepared in anticipation of litigation if, at the time the document is prepared, "'there is a substantial possibility that litigation will occur and ... commencement of that litigation is imminent.'" *Burlington Indus., Inc.*, 1997 WL 404319, at *2 (quoting *FDIC v. Cherry, Bekaert & Holland*, 131 F.R.D. 596, 603 (M.D. Fla. 1990)).

Here, Plaintiff's Motion to Compel, on its face, seeks to compel production only of documents protected by the attorney-client privilege. The Court therefore does not, and need not, discuss whether Defendant Mohawk has waived any work product protection that might attach to the documents Plaintiff seeks. The general principles of waiver discussed *infra*, however, would apply to the work product privilege as well.

legal advice when he interviewed Plaintiff.[6] According to Plaintiff, Defendant Mohawk represented that Attorney Morillo's questioning of Plaintiff did not relate to the *Williams* Action, and Attorney Morillo thus must simply have interviewed Plaintiff to determine whether Defendant should terminate Plaintiff's employment. Plaintiff contends that the attorney-client privileges could not have attached under *Upjohn v. United States*, 449 U.S. 383 (1981), because Plaintiff, as a low-level shift supervisor with only six months of seniority, did not have a significant relationship with Defendant Mohawk. Alternatively, Plaintiff argues that Attorney Morillo provided the services at issue primarily for business purposes, because Attorney Morillo simply interviewed Plaintiff to determine whether Defendant Mohawk should terminate Plaintiff's employment. The Court addresses those contentions in turn.

In *Upjohn*, the Supreme Court rejected the control group test used by the United States Court of Appeals for the Third Circuit. 449 U.S. at 392 ("The control group test adopted by the court below thus frustrates the very purpose of the [attorney-client] privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."). Instead,

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[6] The Court finds unpersuasive Plaintiff's contentions that Attorney Morillo could not possibly have been providing legal advice to Defendant Mohawk because Attorney Morillo's advice did not relate to the *Williams* case, in which he was admitted *pro hac vice*, and that Attorney Morillo consequently engaged in the unauthorized practice of law.

"*Upjohn* allows a corporation to invoke the attorney-client privilege when the information giver is 'an employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services.'" *Burlington Indus., Inc.*, 1997 WL 404319, at *3 (quoting John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 487 (1982)). Here, Plaintiff contends that Mr. Carpenter cannot possibly have had a significant relationship to Defendant Mohawk, given his status as a six-month shift supervisor. This argument, however, ignores the fact that Mr. Carpenter had unique information concerning the legal issue that Defendant Mohawk contended it faced: allegations of hiring illegal workers. Mr. Carpenter thus had a significant relationship to Defendant Mohawk for purposes of the legal advice that Defendant Mohawk contends Attorney Morillo provided. Under those circumstances, the communications between Attorney Morillo and Mr. Carpenter could qualify as privileged communications under *Upjohn*.[7]

Plaintiff also contends that Attorney Morillo's communications concerning Mr. Carpenter were not privileged, because those communications occurred for the purpose of providing business advice, rather than legal advice. "Attorney-client communications concerning business matters are not within the attorney-client privilege." *BellSouth Adver. & Publ'g Corp. v. Am. Bus. Lists, Inc.*, No. Civ. 1:90-CV-149-JEC, 1992 WL 338392, at *8 (N.D. Ga. Sept. 8, 2002). "The attorney-client privilege[] is not lost, however, if business advice is simply incorporated into legal advice of counsel." *Id.* As one court noted:

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[7] Similarly, the communications between Attorney Morillo and Ms. Martinez could qualify as privileged under *Upjohn*.

> "The mere mention of business considerations is not enough to compel the disclosure of otherwise privileged material . . . Legal advice should remain protected along with 'nonlegal considerations' discussed between client and counsel that are relevant to that consultation, but when the ultimate decision then requires the exercise of business judgment and when what were relevant nonlegal considerations incidental to the formulation of legal advice emerged as the business reasons for and against a course of action, those business reasons considered among executives are not privileged."

*Eglin Fed. Credit Union v. Cantor., Fitzgerald Sec. Corp.*, 91 F.R.D. 414, 420 (N.D. Ga. 1981) (quoting *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517 (N.D. Conn. 1976)). When advice given by an attorney relates to both business and legal matters, the legal advice must predominate in order for the attorney-client privilege to apply. *Marten v. Yellow Freight Sys., Inc.*, No. Civ. A. 96-2013-GTW, 1998 WL 13244, at *7 (D. Kan. Jan. 6, 1998). Once again, the party asserting the attorney-client privilege bears the burden of showing that the attorney acted in his or her capacity as a legal advisory. *Id.* at *6.

Here, Defendant Mohawk has adduced a declaration from its former general counsel, Salvatore J. Perrillo. In that declaration, Attorney Perillo simply states: "On December 4 and 5, 2006 Juan Morillo, outside counsel for Mohawk, interviewed Mohawk employees, including Norman Carpenter, for the purpose of providing legal advice to Mohawk." This conclusory statement, however, simply is not sufficient to show that Attorney Morillo acted as a lawyer, rather than a business advisor, when he interviewed Plaintiff.

In any event, however, the Court finds, for purposes of this Motion, that Defendant Mohawk has sufficiently demonstrated that Attorney Morillo provided legal services and legal advice, rather than simply providing business advice, when he interviewed Plaintiff and discussed the results of that interview with Defendant Mohawk's personnel. The record demonstrates that Attorney Morillo conducted the interview as part of a legal investigation seeking to determine whether Defendant Mohawk or Plaintiff had violated, or had attempted to violate, federal immigration law. Under those circumstances, the Court finds that the communications at issue fall under the protection of the attorney-client privilege.[8] The Court next determines whether Defendant Mohawk has waived the attorney-client privilege.

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[8] With one exception, the Court also rejects any contentions made by Plaintiff that the privilege log produced by Defendant Mohawk is insufficient. Federal Rule of Civil Procedure 26(b)(5)(A) provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is

(Cont'd)

### 2. Whether Defendant Mohawk Waived the Privilege

"The attorney-client privilege 'belongs solely to the client,' and the client may waive it, either expressly or by implication." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994) (quoting *In re Von Bulow,* 828 F.2d 94, 100, 101 (2d Cir. 1987)). Once a party waives the attorney-client privilege as to a communication, the waiver generally "extends to all other communications relating to the same subject matter." *BellSouth Adver. & Publ'g Corp.*, 1992 WL 338392, at *8. Further, "once waived, the attorney-client

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(Cont'd)

> privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed. R. Civ. P. 26(b)(5)(A). Defendant Mohawk's privilege log comports with those requirements. (Def. Mohawk's Resp. Pl.'s Mot. Compel Ex. B.) To the extent that Attorney Morillo's assistant took notes during the interview of Plaintiff that are not reflected on Defendant Mohawk's privilege log and that have not been produced, however, the Court directs Defendant Mohawk to update its privilege log to include those notes.

privilege cannot be reasserted." *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987).

The United States Court of Appeals for the Eleventh Circuit has observed that "the doctrine of waiver by implication reflects the position that the attorney-client privilege 'was intended as a shield, not a sword.'" *Cox*, 17 F.3d at 1417 (quoting *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987)) (internal quotation marks omitted). "In other words, '[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.'" *Id.* (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)) (alteration in original).

Because the attorney-client privilege is a shield and not a sword, a party may waive the privilege "if it injects into the case an issue that in fairness requires an examination of otherwise protected communications." *Cox*, 17 F.3d at 1419; *see also Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989) ("The great weight of authority holds that the attorney-client privilege is waived when a litigant 'place[s] information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.'") (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)).[9] Although this particular type of waiver often occurs when a defendant raises an affirmative defense, the defendant need not raise an affirmative defense for this type of waiver to occur. *Id.* "To waive the attorney client privilege by voluntarily injecting an issue in the case, a defendant must do more than merely deny a plaintiff's allegations. The holder must inject a new factual or legal issue into the case." *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987).[10]

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[9] A waiver of the attorney-client privilege also may occur when a party discloses otherwise privileged communications,

(Cont'd)

The Eleventh Circuit found that the party had "injected the issue of its knowledge of the law into the

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(Cont'd)

or testifies as to those communications. *Outside the Box Innovations, Inc. v. Travel Caddy, Inc.*, 455 F. Supp. 2d 1374, 1376-77 (N.D. Ga. 2006) (noting that, in patent case, when party defends actions by disclosing attorney-client communication, party waives attorney-client privilege for all communications involving same subject matter); *Sperling v. City of Kennesaw Police Dep't*, 202 F.R.D. 325, 328 (N. D. Ga. 2001) (finding plaintiff waived attorney-client privilege where plaintiff testified about narrative she gave to counsel and relied on it to refresh her recollection). Simply testifying about facts, however, will not waive the attorney-client privilege. *Coleman v. Am. Broad. Cos.*, 106 F.R.D. 201, 209-10 (D.D.C. 1985). Here, there is no evidence indicating that Defendant Mohawk has disclosed an otherwise privileged communication or offered testimony concerning such a communication. The Court therefore need not, and does not, determine whether this type of waiver has occurred.

[10] The Court therefore rejects the contentions made by the plaintiffs in the *Williams* Action that Defendant Mohawk waived its attorney-client privilege by denying Plaintiff's allegations in its Answer to Plaintiff's First Amended Complaint.

case and thereby waived the attorney-client privilege" where a party not only denied criminal intent but also affirmatively asserted that it believed its change in a pension fund policy was legal. *Cox*, 17 F.3d at 1419. Similarly, in *Conkling v. Turner*, 883 F.2d 431 (5th Cir. 1989), the United States Court of Appeals for the Fifth Circuit found that a plaintiff in a Racketeer Influenced Corrupt Organizations case had waived the attorney-client privilege where the plaintiff "injected into th[e] litigation the issue of when he knew or should have known of the falsity of [the defendant's] assertion regarding the stock ownership." 883 F.2d at 435.

Additionally, in *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), the United States Court of Appeals for the Second Circuit affirmed a ruling of a federal district court finding that a criminal defendant in a securities law case would waive the attorney-client privilege by testifying as to his belief that the financing structure of the transactions at issue would allow the defendant "legally to avoid disclosure regarding other investors, and that describing the source of his funds as 'personal' was lawful." 926 F.2d at 1291. The court observed that the attorney-client privilege "may implicitly be waived when [a] defendant asserts a claim that in fairness requires examination of protected communications." *Id.* at 1292. The court found that this waiver principle applied, because the defendant's "testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent." *Id.*

Similarly, in *Baratta v. Homeland Housewares, LLC*, 242 F.R.D. 641 (S.D. Fla. 2007), the court found that the plaintiff had waived his attorney-client privilege with respect to his communications with counsel concerning settlement where the plaintiff expressly denied that he had assented to the settlement negotiated by his counsel. 242 F.R.D. at 643. The court observed:

> In this case, to allow [plaintiff] to testify that he never gave [his counsel] settlement authority, while at the same time disallowing Defendant to inquire into the subject matter of his and his litigation attorney's exchanges regarding settlement, would result in a sword/shield situation whereby [plaintiff] would be permitted to give his one-sided version of the story, while shielding himself from potentially harmful testimony of another. The Court agrees with Defendant that the law does not permit [plaintiff] to maintain such a convenient position, in frustration of Defendant's right to discovery of critical facts and information that cannot be obtained from any source other than [plaintiff's counsel].

*Id.*

Finally, in *Rivera v. Kmart Corp.*, 190 F.R.D. 298 (D.P.R. 2000), the court found that an implied waiver of the attorney-client privilege had occurred where the defendant in an employment discrimination case used documents pertaining to an interview of its store manager to support its position that it terminated the plaintiffs based on their involvement in destruction of merchandise to be included in an insurance claim. 190 F.R.D. at 304. Specifically, the court noted:

> Plaintiffs argue that Kmart waived its claim of attorney-client privilege concerning documents involving the interview of Elvin Gonzalez, Kmart's Rio Hondo Store Manager, by using the content of these documents to support their position that, besides Plaintiffs, Kmart investigators have been unable to confirm any wrongdoing from any of [the] other Kmart managers with regards to the intentional destruction of merchandise. In its reply to Plaintiffs' Opposition to summary judgment, Kmart cites to an unsworn statement made under penalty of perjury by Nolan Bomar, to support its position that Kmart has not been able to confirm any wrongful destruction of merchandise by managers other than Plaintiffs. In this unsworn statement, Bomar states that during the insurance audits, Elvin Gonzalez was the store manager at the Kmart Rio Hondo Store and that he was on Workers' Compensation Leave from August 14, 1999. By citing to

Bomar, who makes reference to Gonzalez's interview, Plaintiffs suggest that Kmart is using the contents of the documents pertaining to the interview as a sword to support its position pertaining to Plaintiffs' termination and the privilege of attorney client privilege [sic] as a shield to avoid their discovery.

A litigant cannot use the attorney-client privilege as both a "sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." Therefore, the Court must determine whether Kmart relied on the document pertaining to Elvin Gonzalez's interview to prove that Kmart has not been able to confirm any wrongdoing.

If Kmart is relying on the fact that Kmart investigators interviewed Elvin Gonzalez to support, at least in part, its position that no other wrongdoing related to Hurricane Georges insurance claims has been confirmed by Kmart, the contents of the interview are essential to determine whether or not Kmart's position is tenable. Defendant alleges that what dictated its decision to fire Plaintiffs was their involvement in the destruction of merchandise to be included in an insurance claim. Plaintiffs counter that what drove

> Kmart's decision to terminate them was their testimony to the authorities that they received instructions from their supervisors to damage merchandise to include in the insurance claim. Therefore, Defendant's claim requires examinations of those communications that would add or subtract credence from their position.
>
> Although the Court is not weighing its probative value, after reviewing the document which Kmart claims to be privileged and identified as Document 16, the Court finds that its contents are directly relevant and central to the issue of Kmart's reasons for dismissing its employees in connection with the Hurricane Georges insurance claim. In view of its relevance and connection with Kmart's allegations pertaining to the process of terminating its employees, the Court concludes that Kmart used the contents of the interview as a sword, albeit a dull one, to support its position and at the same time has attempted to cloak itself with the attorney-client privilege.

*Id.* at 303-04 (citations and footnote omitted).

Here, Defendant Mohawk stated, in response to the Motion for Evidentiary Hearing in the *Williams* Action:

> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.

By making those representations, Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment. *Cox*, 17 F.3d at 1419.

Because the Court has determined that Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment, Defendant Mohawk must update its responses to Plaintiff's discovery request to disclose those communications. The Court therefore orders Defendant Mohawk to provide full responses to Plaintiff's First Interrogatories Nos. 1, 3, and 4 and Plaintiff's Requests for Production of Documents Nos. 4, 6, 7, 12, 13, 14, 15, 32, 33, and 34, and to produce documents one through four listed on Defendant Mohawk's privilege log, within forty-five days. The Court further orders Defendant Mohawk to produce the notes taken by Attorney Morillo's assistant during Attorney Morillo's interview of Mr. Carpenter, if such notes exist, to Plaintiff within forty-five days.

The Court recognizes the seriousness of its finding that Defendant Mohawk has waived the attorney-client privilege. Defendant Mohawk, understandably, likely will wish to appeal from this Order. Although the Court is not convinced that appealing this Order as an interlocutory order under 28 U.S.C.A. § 1292(b) would be appropriate, Defendant Mohawk may have other avenues to appeal available, such as a petition for mandamus or appealing this Order under the collateral order doctrine. *See In re Ford Motor Co.*, 110 F.3d 954, 957-964 (3d Cir. 1997) (discussing potential availability of appellate jurisdiction to appeal discovery order under collateral order doctrine and under mandamus); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 607 (8th Cir. 1978) (noting "mandamus is available as a means of immediate appellate review" for discovery order). The Court will stay the deadline for producing documents and discovery responses established by this Order in the event that Defendant Mohawk chooses to appeal.

## IV. Conclusion

ACCORDINGLY, the Court **GRANTS** Plaintiff's Motion to Compel Responses to Plaintiffs First Interrogatories and Request to Produce Documents that Mohawk Contends Are Protected By the Attorney-Client Privilege [31] The Court **ORDERS** Defendant Mohawk to provide full responses to Plaintiff's First Interrogatories Nos. 1, 3, and 4 and Plaintiff's Requests for Production of Documents Nos. 4, 6, 7, 12, 13, 14, 15, 32, 33, and 34, and to produce documents one through four listed on Defendant Mohawk's privilege log, within forty-five (45) days. The Court further **ORDERS** Defendant Mohawk to produce the notes taken by Attorney Morillo's assistant during Attorney Morillo's interview of Mr. Carpenter, if such notes exist, to Plaintiff within forty-five (45) days. The Court will stay the deadlines for producing the above information and responses if Defendant Mohawk chooses to appeal from this Order.

The Court **GRANTS IN PART AND DENIES IN PART** Defendant Mohawk's Motion for Protective Order [32]. The Court **DENIES** the portion of the Motion that seeks an Order stating that Defendant Mohawk will not waive its attorney-client privilege by asking questions of Plaintiff and Christina Martinez pertaining to their interviews by Attorney Juan Morillo. The Court further **DENIES** the portion of the Motion that requests the Court to enter the proposed protective order attached to the Motion. The Court **GRANTS** the portion of the Motion seeking to limit attendance at the depositions of Plaintiff and Ms. Martinez to the parties in this case, the witnesses, and the parties' or witnesses' counsel, and **GRANTS** the portion of the Motion seeking to keep the deposition transcripts confidential until the Court can rule on any issue of waiver that may arise from the depositions.

IT IS SO ORDERED, this the 1st day of October, 2007.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

# OPPOSITION
# BRIEF

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Supreme Court, U.S.
FILED
DEC 23 2008
OFFICE OF THE CLERK

No. 08-678

# In The
# Supreme Court of the United States

◆

MOHAWK INDUSTRIES, INC.,

*Petitioner,*

v.

NORMAN CARPENTER,

*Respondent.*

◆

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

◆

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# QUESTION PRESENTED

Whether a party can immediately appeal, under the collateral order doctrine as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a district court's interlocutory discovery order because the party seeking the appeal unsuccessfully opposed the requested discovery under a privilege or confidentiality doctrine?

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## STATEMENT OF THE CASE

Petitioner Mohawk Industries, Inc. ("Mohawk") lost a standard discovery dispute at the District Court in a federal civil rights lawsuit filed against it by a former Mohawk supervisor, Respondent Norman Carpenter ("Carpenter"). Mohawk sought to appeal that order to the United States Court of Appeals for the Eleventh Circuit, which correctly dismissed the appeal as it had no jurisdiction over an interlocutory discovery order. Mohawk filed this Petition requesting that the Court grant *certiorari* and establish new precedent that would allow parties to obtain immediate appeal of any adverse discovery order if they contend that it will require them to produce discovery that they claim is protected on the basis of a doctrine of privilege or confidentiality.

This lawsuit is based on a series of events triggered when Carpenter, while still employed, reported to Mohawk in an email that he had learned that Mohawk employed illegal aliens on his shift. Unbeknownst to Carpenter, Mohawk was defending a federal court RICO class action alleging that Mohawk conspired with its hiring agencies to employ illegal aliens.

After receiving Carpenter's email that would be so damaging to it in the class action, Mohawk required Carpenter to be confronted only by its lead class action trial lawyer. After acknowledging to Carpenter the relationship between his email and the class action, Mohawk's trial lawyer unsuccessfully sought to pressure Carpenter to recant his email. With no further conversation with Carpenter, Mohawk fired him the very next day. Even more, when firing Carpenter, Mohawk told him that it was he and not Mohawk who had engaged in the criminal harboring of illegal aliens. By falsely accusing Carpenter of criminal conduct, Mohawk aimed to deter Carpenter from testifying in the class action about his email and knowledge of illegal aliens at Mohawk because, if he did, Mohawk would again publicly accuse him of criminal conduct. Among other claims, Carpenter alleges that the actions of Mohawk and its agents violated 42 U.S.C. §1985(2) because they conspired to seek to deter him by threat and intimidation from testifying or testifying truthfully in the federal court class action.

After Carpenter filed suit, Mohawk filed a very aggressive brief against Carpenter with the District Court. In essence, Mohawk carried forward on its previous threat to falsely accuse him of criminal conduct if he injected himself in the class action. After announcing, "the true facts are these," Mohawk submitted 14 sentences slashing at Carpenter and his claims, asserting that Carpenter was the criminal wrongdoer and that Mohawk's actions against him were taken solely based on an "entirely appropriate" investigation. In its "true facts," Mohawk identified only one action it took in its "investigation" – its trial lawyer's "interview" of Carpenter. Based on that "interview" and Mohawk's purported findings from it, Mohawk asserted to the District Court that it would establish that it was Carpenter and not Mohawk who had "engaged in blatant and illegal conduct."

Carpenter requested discovery on the heralded attorney investigation on which Mohawk staked its case. But Mohawk then raised a shield claiming that Carpenter could not discover the bases for its "true facts" investigation submitted to the District Court because all communications relating to it were protected by the attorney-client privilege. The District Court applied well-settled waiver law and held that Mohawk had waived the privilege by asserting and relying on the privileged communications in its "true facts" assertions, and that Mohawk could not then seek to shield itself from discovery on those "true facts" on the basis of the privilege. Mohawk sought to appeal that discovery order, and the Eleventh Circuit correctly dismissed the appeal for lack of jurisdiction.

In its Petition, Mohawk contends that this Court should significantly expand the collateral order doctrine that this Court adopted in *Cohen* to require the appellate court to take jurisdiction over any discovery dispute where one party relied unsuccessfully on a claim of a privilege or a confidentiality doctrine. However, in the almost 60 years since *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court has never applied that extremely narrow exception to the final order doctrine to allow a party to obtain a direct appeal of a discovery order. Moreover, in 2006, this Court stated that it "has been asked many times to expand" the *Cohen* exception and has repeatedly rejected those efforts in order to keep the exception narrow.

Mohawk's Petition is another effort to get this Court to significantly expand *Cohen*. This Petition is not about the attorney-client privilege as Mohawk contends but about the importance of the final order doctrine. As the Eleventh Circuit protected that doctrine in compliance with this Court's precedent, there is no need for this Court to grant *certiorari* in this case.

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## STATEMENT OF FACTS

### I. The *Williams v. Mohawk* Class Action.

In January 2004, a group of current and former Mohawk employees filed a class action lawsuit against Mohawk in the District Court. *Williams v. Mohawk, Industries, Inc.* (N.D. Ga. – Rome Division – Civil Action File No. 4:04-CV-0003-HLM). [R:1-12-2-5]. The *Williams* plaintiffs allege that Mohawk violated federal and Georgia RICO laws by engaging in an illegal conspiracy with a group of temporary staffing companies to place illegal aliens ("temporaries") to work at Mohawk. [*Id.*].

### II. Carpenter's Allegations.

In June 2006, Mohawk hired Carpenter as a Shift Supervisor at a Mohawk facility in Georgia. [R:1-12-7]. Carpenter's shift included "temporaries." [*Id.*]. In November 2006, Carpenter learned for the first time that most of the temporaries on his shift were not legal to work in the United States. [R:1-12-9].

On November 28, 2006, Carpenter sent an email to Mohawk's Human Resources Manager, Becky Hale ("Hale"), stating: "Becky, 90% of the people that come through the temp do not have good papers[.] [T]hats (sic) why they come to us that way[.] I can tell you that most of the people working here today here through a temp do not have one of the two things either a GA I.d. (sic) or good papers through the I.N.S. Thanks, Norman." [R:1-12-9].

Unbeknownst to Carpenter who had been at Mohawk for less than six months, his report was the exact type of evidence sought by the plaintiffs in *Williams*. [R:1-12-4-5]. Carpenter also did not know that Hale had told one of Carpenter's non-temporary employees [Christina Martinez] that she [Hale] was aware that Mohawk hired illegal aliens and that, if such illegal aliens came to Mohawk with a Social Security Number and a false identification, Hale would hire them. [R:1-12-10-11].

Mohawk's only response to Carpenter's email report was to require him to meet with Mohawk's outside, lead, trial counsel in *Williams* – Juan Morillo ("Morillo"). [R:1-12-14-15]. Carpenter alleges that this meeting was designed to coerce and intimidate him into recanting his email report of illegal aliens – such that he would not testify or testify truthfully about his knowledge of Mohawk's actions in *Williams*. [*Id.*] Carpenter did not recant. [*Id.*]

The very next day, a Mohawk Human Resources executive informed Carpenter that (1) she had been informed of his "interview" by Morillo; and (2) Carpenter was terminated because he had committed the crime of retaining illegal aliens on his shift. [R:1-12-16-17]. Among other claims, Carpenter alleges in his lawsuit that Mohawk terminated him with a knowingly false allegation that he had committed a crime in order to deter him from testifying or testifying truthfully in *Williams* in violation of 42 U.S.C. §1985(2).

## III. Mohawk's Factual Assertions Against Carpenter.

After Carpenter filed his suit, the *Williams* plaintiffs sought expedited discovery on Carpenter's allegations, and the District Court determined that *Williams* and *Carpenter* were related cases. [R:3-43-3-4]. Mohawk made the decision to oppose expedited discovery and in doing so made the strategic decision to respond to Carpenter's allegations with a brief directly attacking Carpenter to the District Court with what it called "the true facts" – its injection of substantial new factual and other allegations against Carpenter ("True Facts"). [R:2-37, Ex. A].

It was Mohawk's assertion of its True Facts in its Brief that understandably caused the District Court to later conclude that Mohawk could not evade discovery about the True Facts on the basis of the attorney-client privilege. But Mohawk's contention that the District Court found a waiver based only on three sentences of Mohawk's True Facts is not correct.

Instead, the True Facts were over three pages long and 14 (not 3) sentences of them were quoted by the District Court in the discovery order at issue.

Mohawk wrote to the District Court that it was presenting the True Facts to rebut Carpenter's allegations in his suit and indeed to prove even more that Carpenter was a "disgruntled former Mohawk employee" who had (1) asserted "ludicrous allegations"; (2) "engaged in blatant and illegal misconduct"; and (3) filed his "meritless strike suit" "to make Mohawk pay" in a "sad effort to extort Mohawk" and to engage in a "slur against Mohawk." [R:2-37, Ex. A, pp. 2, 5, 7, 13].

To prove its case, Mohawk announced, "The true facts are these" and launched into the following factual recitation:

> . . . Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct. [After Carpenter sent Hale the email quoted above], Ms. Hale immediately forwarded the email chain to Mohawk management to report Mr. Carpenter's attempt to have an unauthorized worker hired and his assertion that some of the temporary workers under his supervision were unauthorized.
>
> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove facility were not

> authorized to work in the United States. As a part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.
>
> As a result of Mr. Carpenter's conduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.
>
> . . . Mohawk and its counsel communicated with Mr. Carpenter in relation to an internal investigation of alleged misconduct by Mr. Carpenter – not about this [*Williams*] litigation. Nothing in the Class Communications Order requires Mohawk to turn a blind eye to unethical or illegal conduct.

[R:2-37, Ex. A, pp. 4-7, 10]

## IV. Carpenter's Relevant Discovery Requests.

Early in discovery it was apparent that Mohawk had a real problem trying to back up its "True Facts." Indeed, in its Answer, Mohawk admitted that HR told Carpenter he was terminated not for trying to hire an illegal temporary employee but because he "knowingly allowed illegal employees to work on his shift."

[R:1-22-15, ¶ 15]. Mohawk HR and Morillo had not gotten their stories straight.[1]

It was these contradictions at the tip of the iceberg of Mohawk's pretext that understandably lead Carpenter to serve discovery requests designed to prove that Mohawk's True Facts were not true at all but asserted to the District Court to cover up the fact that they fired him with a criminal accusation to keep him away from the deposition table and courtroom in *Williams*. Carpenter served document requests and interrogatories requesting the identity and role of the individuals involved in, any communications regarding, and any documents reflecting or referring to Mohawk's bogus "investigation" of Carpenter that it injected into the case with its True Facts. [R:3-43-23-31] Aware that its True Facts were about to implode in discovery, Mohawk objected to all of these discovery requests (while identifying four responsive documents in a privilege log) claiming that the responsive discovery was all protected by the attorney-client privilege. [*Id.*]

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[1] Indeed, in its Petition, Mohawk tried another new explanation, asserting that Carpenter sent an email to Hale stating he wanted to hire an applicant for a temporary position [Tania Perez] that he believed at the time was illegal. [Petition, p. 3]. There is no such email, and Mohawk cites to none. Instead, Mohawk has conflated two different emails in order to give the false impression that Carpenter knowingly tried to have Perez hired when he knew she was illegal; he did not do so and there is no evidence that he did. [R:37-2, Ex. A, p. 5].

## V. Carpenter's Motion And The District Court's Discovery Order.

Carpenter filed a Motion to Compel responses to its discovery requests regarding Mohawk's purported True Facts "investigation" of him. [R:2-31] Carpenter asserted that (1) the requested discovery was not protected by the privilege; and (2) any privilege attaching to the investigation had been waived by Mohawk by injecting its allegations of and about the investigation in its True Facts. [*Id.*].

The District Court granted Carpenter's Motion. [R:3-44]. It first held that the discovery requests did seek information and documents protected by the privilege. [R:3-31-42]. However, relying significantly on the Eleventh Circuit's decision in *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), the District Court held that, because Mohawk injected assertions about the investigation into the case, it had placed the actions of Morillo in issue in the case and Mohawk had "waived the attorney-client privilege with respect to communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment." [R:3-54].

## VI. Mohawk's Unsuccessful Effort To Appeal The Discovery Order.

Had Mohawk complied with the discovery order, it would have produced the requested discovery and this case may have been tried by now. But Mohawk realized that allowing the light of discovery on its

True Facts would present real problems for it at trial. Thus, it sought to appeal the discovery order. Carpenter moved to dismiss the appeal as the Eleventh Circuit did not have jurisdiction to hear an immediate appeal of a discovery order. The Eleventh Circuit granted Carpenter's Motion and rejected Mohawk's effort to expand this Court's *Cohen* doctrine to allow immediate appeals of discovery orders just because the losing party in the order claims that the discovery in question is privileged or confidential.

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## REASONS FOR DENYING THE PETITION

### I. The Eleventh Circuit's Dismissal Of Mohawk's Appeal Is Consistent With This Court's Precedent And Does Not Present A Significant Conflict Among The Circuit Courts Of Appeals.

The federal courts of appeals have "jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. §1291. Mohawk seeks to squeeze the discovery order here into the very narrow "collateral order" exception to this rule established by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). It is clear from this Court's precedent that *Cohen* cannot make a discovery order immediately appealable.

First, this Court has repeatedly made clear *Cohen* has very narrow application. The collateral order doctrine accommodates a "small class" of rulings that do not conclude the litigation, but conclusively resolve "claims of right separable from, and collateral to, rights asserted in the action." *Behrens v. Pelletier,* 516 U.S. 299, 305 (1996) (internal marks omitted). The claims that fall within the collateral order doctrine are claims that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

In *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865, 868 (1994), this Court reiterated that the collateral order doctrine was a narrow doctrine for a "small class of cases," that this Court has "kept narrow and selective" and that the law "should stay that way." Most recently, in *Will v. Hallock*, 546 U.S. 345 (2006), this Court emphasized the "stringent" requirements of the collateral order doctrine and made clear that, unless kept exceedingly narrow, "the underlying doctrine will overpower the substantial finality interests §1291 is meant to further: 'judicial efficiency, for example, and the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.'" *Id.* at 350 (citations omitted). Thus, the Court explained:

> We have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope. . . . And we have meant what we have said; although the Court has been asked many times to expand the "small class" of collaterally appealable orders, we have instead kept it narrow and selective in its membership.

*Id.*

True to its word, this Court has allowed the application of the doctrine only in a narrow set of cases involving the fundamental functioning of the government or our system of justice. *See e.g.*, *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982) (utilizing doctrine to allow an immediate appeal of a denial of absolute public immunity based on the "compelling public ends" that are "rooted in . . . the separation of powers," that would be compromised by failing to allow such an immediate appeal); *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985) (utilizing doctrine to allow immediate review of a denial of qualified immunity, and specifically referencing the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service, if a full trial were threatened whenever they acted reasonably in the face of law that is not "clearly established"); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993) (allowing immediate appeal of an order denying a claim of Eleventh Amendment immunity by explaining the critical need to ensure vindication of a State's dignitary interests).

Notably, in the almost 60 years since *Cohen*, this Court has never applied it to allow an immediate appeal of a discovery dispute. Even more, its statements in two cases are entirely inconsistent with a conclusion that *Cohen* can apply to a discovery order.

First, in *Church of Scientology v. United States*, 506 U.S. 9, 17 n.11 (1992), this Court stated, "A party that seeks to present an objectionable discovery order immediately to a court of appeals ***must*** refuse compliance, be held in contempt, and then appeal the contempt order." (Emphasis supplied).

Second, in *Cunningham v. Hamilton County*, 527 U.S. 189 (1999), this Court expressly held that an order for sanctions under Fed. R. Civ. P. 37 (not a finding of contempt) arising out of a failure to comply with a court's order to produce complete discovery responses was not immediately appealable under the collateral order doctrine. Among other things, this Court held that an examination of the sanctions order would require an examination of the discovery order and that such an examination "would differ only marginally from an inquiry into the merits and counsels against application of the collateral order doctrine." *Id.* at 206.

Nine circuits (including the Eleventh Circuit in this case) have heeded this Court's "keep *Cohen* narrow" direction and have expressly held that a discovery order is not immediately appealable because it requires disclosure of communications that are arguably or actually (under a waiver) protected by the attorney-client privilege. First, there are such decisions from six circuits identified by Mohawk and/or the Eleventh Circuit below: *FDIC v. Ogden Corp.,* 202 F.3d 454, 458 & n.2 (1st Cir. 2000) (holding that "[d]iscovery orders generally are not thought to come within [the collateral order doctrine]" and noting that the "perfect example" of a discovery order that is not appealable under the doctrine is one involving a party's claim of attorney-client privilege) (emphasis in original); *Boughton v. Cotter Corp.,* 10 F.3d 746, 748-49 (10th Cir. 1993) (holding that there is no appellate jurisdiction over a discovery order touching on privilege); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2nd Cir. 1992) (pretrial discovery orders on privilege not appealable under the collateral order doctrine); *Reise v. Bd. of Regents of Univ. of Wisconsin Sys.*, 957 F.2d 293, 295 (7th Cir. 1992) ("[O]rders to produce information over strong objections based on privilege are not appealable."); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991) (order compelling attorney opinion letters was not immediately appealable under collateral order doctrine).

In addition, two other circuits have made statements establishing that they agree with the strong majority of circuits on this question. *United States v. In The Matter Of The Search Of 235 South Queen Street, Martinsburg, W.V.*, 2008 U.S. App. LEXIS

22902 (4th Cir. 2008) (collateral order doctrine did not allow for immediate appeal of discovery order holding attorney-client privilege did not protect documents under the crime fraud exception); *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005) ("Though two of our sister circuits allow immediate review of discovery orders involving claim of privilege under the collateral order doctrine . . . , this court does not ordinarily do so." – identifying exception as cases where privilege held by a third party and party claiming the privilege "powerless to avert mischief of the order."); *see also In Re: Grand Jury Proceedings-Gordon*, 722 F.2d 303, 305-06 (6th Cir. 1983) (holding in case involving attorney-client privilege that "an order compelling testimony or denying a motion to quash a grand jury subpoena is not appealable").

As Mohawk indicates in its Petition, there are three minority circuits that have applied the collateral order doctrine to allow an immediate appeal of a discovery order involving privileged communications. *UMG Recording, Inc. v. Bertelsmann AG,* 469 F.3d 1078, 1087-88 (9th Cir. 2007); *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003); *Kelly v. Ford Motor Co.*, 110 F.3d 954 (3rd Cir. 1997). There are, however, two important points to be made with respect to these three minority circuits.

First, in contrast to the majority circuit decisions, these minority circuit decisions effectively ignored this Court's admonitions about expanding the *Cohen* doctrine. Thus, these decisions do not suggest a need of guidance from this Court but are simply examples of decisions ignoring the clear guidance this Court has repeatedly given.

Second, the seminal minority case is the Third Circuit decision *Kelly* (which was cited by the D.C. Circuit in *Phillip Morris*), and a close examination of Third Circuit law on this question both before and after *Kelly* establishes that the Third Circuit is likely to reverse *Kelly* on its first *en banc* opportunity. The effect of such a reversal on the remaining two outlier circuits may itself end the last remnants of a split.

First, in *Smith v. BIC Corporation*, 859 F.2d 194 (3rd Cir. 1989), the court applied the collateral order doctrine to allow an immediate appeal of a discovery order allowing the production of information that allegedly revealed a party's trade secrets. Second, in *Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Co.*, 32 F.3d 851 (3rd Cir. 1994), the court held that the collateral order doctrine did not permit immediate appeal of a discovery order requiring the production of documents protected by the attorney-client and accountant-client privilege on the grounds of waiver. The court logically distinguished *Smith*, stating:

> In *Smith*, we held that the public disclosure of trade secrets is not effectively reviewable. A trade secret is valuable because it allows a business to obtain an advantage over competitors who do not know or use it. The damage suffered by a business due to public disclosure of trade secrets cannot be

> remedied by an appellate court because the court cannot make the information secret again. Here, however, an appellate court can remedy any damage resulting from the erroneous disclosure of documents after judgment.

*Id.* at 860. The court then applied the reasoning set forth by the Tenth Circuit in *Boughton*, *supra* – that there was no need to apply the collateral order doctrine to allow an immediate review because a later reversal of the discovery order regarding the privilege will prevent the obtaining party from using it at a new trial.

In *Kelly*, a Third Circuit panel was faced with the same issue the panel had faced in *Rhone-Poulenc Rorer*, but it reached a directly contrary result. The *Kelly* panel stated that *Rhone-Poulenc Rorer* was inconsistent with *Smith* and then illogically held that it was bound by *Smith* rather than by the more directly applicable *Rhone-Poulenc Rorer*. However, that was simply not the case. *Rhone-Poulenc Rorer* effectively and logically distinguished *Smith*. Under Third Circuit law, *Kelly* impermissibly reversed *Rhone-Poulenc Rorer*. *See O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3rd Cir. 1981) ("[A] panel of this court cannot overrule a prior panel precedent."). Thus, *Kelly* is not properly the law in the Third Circuit.

Not surprisingly, the Third Circuit has since decidedly backed away from *Kelly* and *Smith*. In *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 54-56 (3rd Cir.

2000), the court cited numerous cases rejecting the approach in *Kelly* and acknowledged that "[o]ther courts of appeals have rejected our approach . . . and have declined to exercise jurisdiction under the collateral order doctrine over appeals from discovery orders, even when privilege issues are involved." Most recently, in *In Re: Carco Electronics*, 536 F.3d 211, 214 (3rd Cir. 2008), the court held that recent decisions from this Court (cited above) suggested that *Smith* was "flawed." It stated that "a reversal of *Smith* must be left to the wise counsel of the Court *en banc*." *Id.* And of course, as *Kelly* effectively reversed *Rhone-Poulenc Rorer* because it believed it to be bound by *Smith*, then *Kelly* is also by definition "flawed" and likely to be reversed along with *Smith* when the Third Circuit next addresses this issue *en banc*. As *Kelly* is the leading minority case on this issue, that result is likely to cause the remaining two outlying circuits to follow this Court's narrow application of *Cohen* and thus end any split on this issue.

Accordingly, particularly because of recent decisions from this Court already setting the narrow parameters of the collateral order doctrine, the small split in the circuits relied upon by Mohawk is already crumbling and will likely die on its own. Thus, there is no split in the circuits of the type that warrants *certiorari*. *See United States v. Chandler*, 282 F.3d 448, 450 (7th Cir. 2002) ("[T]here are many cases in which the Court decides to let a conflict stand or at least to allow a good number of circuits to decide the issue before determining whether the conflict will persist.")

## II. This Case Does Not Present An Important Question, As The Attorney-Client Privilege Is Already Appropriately Protected And The Court Of Appeals Has Preserved The Final Order Doctrine.

Carpenter does not dispute that the legal doctrine of the attorney-client privilege is important. However, the privilege is fully and completely protected by the several avenues already available for obtaining immediate appellate review of a discovery order. First, a party can file a petition for a writ of mandamus (as Mohawk unsuccessfully did in this case). Where the discovery order is so erroneous to meet the mandamus standards, appellate courts have correctly used that writ to reverse them. *See In Re: Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) (reversing discovery order on mandamus); *In Re: Fink*, 876 F.2d 84 (11th Cir. 1989) (same). Second, as this Court recognized in *Church of Scientology v. United States*, 506 U.S. 9, 17 n.11 (1992), parties can also obtain immediate review of discovery orders where they believe that the order is clearly erroneous if they refuse compliance with it, are held in contempt, and then appeal the contempt finding.[2]

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[2] Mohawk wrongly argues that the contempt avenue is insufficient because some contempt findings (such as a civil fine)

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Mohawk argues that neither of these routes is satisfactory to it. It contends that the bar for mandamus relief is too high – and argues that there are adverse policy implications in encouraging contempt to appeal an adverse discovery order. But Mohawk has the policy implications exactly backwards as numerous Courts of Appeal have already recognized.

Courts such as the Fourth Circuit have succinctly explained the strong policy reasons for requiring litigants to either wait for the conclusion of the litigation or risk a contempt citation in order to appeal an unfavorable discovery order. Requiring litigants to weigh and balance the costs of complying with the discovery order against the risk of a contempt citation ensures that only the most important discovery disputes are brought to the Court of Appeals and allowed to delay litigation:

> We recognize, of course, that the contempt route is a difficult path to appellate review, and one that may carry with it a significant penalty for failure. In discovery disputes, however, this difficulty is deliberate. As Judge Friendly has noted, the contempt limitation ensures that the aggrieved party will first take a careful "second look" at the issue in question to determine whether it truly

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may not be sufficiently severe to be an appealable order under the contempt law of some circuits. But that argument ultimately fails as, even in those circuits, disobeying that sanction will eventually lead to either a default or a finding of criminal contempt.

> warrants inviting a contempt citation. . . . Indeed, the discovery appeals that arise from that calculus will most likely be those of the greatest significance to both parties – the party resisting discovery must risk a citation for contempt, while the party seeking discovery must move for contempt and thereby risk an interlocutory appeal. *Id.* The alternative to the contempt route, by contrast, is one that encourages appeal of every unpalatable discovery ruling.

*MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121-22 (4th Cir. 1994) (footnote omitted). *See also Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992) ("requiring the party [complaining about a discovery order] to take some risk – to back up his belief with action – winnows weak claims.")

Succinctly stated, the law does not and should not encourage a party to seek immediate appeal of a discovery order – this is the reason for the final judgment rule. But in the rare case where the discovery order was egregious and clearly and indisputably incorrect, the party can obtain immediate appeal either though the mandamus or contempt avenue. The law sets the bar high on mandamus and the risk high on inviting a contempt finding for good reason: to limit immediate appeals of discovery orders to the very rare cases where the district court has indisputably issued an incorrect order that has serious consequences.

In this regard, it is important to note that Mohawk is substantially understating the implications of the expansion of appellate jurisdiction that it is requesting here. Were this Court to grant *certiorari* and expand the collateral order doctrine, the implications would necessarily be profound. Indeed, any discovery order in which the losing party had asserted an objection of privilege (whether attorney/client, accountant/client, doctor/patient, husband/wife, deliberative process or the numerous other privileges recognized by law) or confidentiality (whether based on a claim of trade secret, right to privacy or otherwise) would, under the same rationale, be immediately appealable under the view of Mohawk and the minority circuits. While Mohawk focuses on the attorney-client privilege, it cannot logically or legally place a wall around only that privilege under *Cohen*.

Indeed, the arguments are compelling that it is at least as important (and arguably much more important) to protect valuable trade secrets than it is to protect privileged communications. (One need only ask Coca-Cola whether it is more important to protect the Coca-Cola formula or a statement made by one of its in-house lawyers to an employee.) If Mohawk's view were adopted by this Court, it would result in an ever-increasing number of appeals of non-final discovery orders to the appellate courts.

This is precisely why almost all circuits have rejected Mohawk's argument to expand appellate jurisdiction under *Cohen*. They have recognized that an objection on the basis of attorney-client privilege cannot be distinguished under *Cohen* from other related discovery objections. *See e.g.*, *Bacher*, 211 F.3d at 55 ("we must be careful not to open the door to a flood of collateral order appeals from discovery orders requiring disclosure of unprivileged information which might be characterized as 'sensitive.' Thus, while there may be very good reasons to overturn the district court's order, if we take jurisdiction here we may have difficulty drawing the jurisdictional line in future cases."); *MDK*, 27 F.3d at 119-20 ("A judicially created exception to nonappealability for categories of sensitive information is the quintessential slippery slope. Many parties faced with discovery requests are apt to regard the information sought as sensitive or confidential and seek, at a minimum, to delay its disclosure through an interlocutory trip to an appellate court.")

It is worth noting that Mohawk has successfully delayed discovery by well more than a year in this case simply by seeking appellate review of an interlocutory discovery order. In so doing it has contravened a purpose of the final judgment rule that this Court reiterated in keeping *Cohen* narrow – "the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.'" *Will v. Hallock*, 546 U.S. 345, 350 (2006).

## III. The District Court's Discovery Order Is Not Immediately Appealable Under *Cohen*.

Mohawk correctly states that collateral order jurisdiction can exist only when it involves an order that (1) conclusively determines a disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

Here, the Eleventh Circuit held that Mohawk could not meet the third prong. But in fact, under clear Supreme Court precedent, Mohawk cannot meet either the second or third prong.

With respect to the second prong, putting aside a debate on whether the discovery order here resolved an important issue, discovery orders generally (and particularly ones addressing the doctrine of implied waiver of a privilege) are not "completely separate" from but instead inextricably intertwined with the merits of the action. The most instructive case on this point is *Cunningham v. Hamilton County*, 527 U.S. 189 (1999).

In *Cunningham*, the plaintiff ignored a Magistrate's Order to respond to written discovery requests in a civil rights action. The Magistrate imposed sanctions on the plaintiff's counsel under Fed. R. Civ. P. 37. The District Court affirmed, and the lawyer sought an immediate appeal under the collateral order doctrine, but the appellate court held that the doctrine did not apply and dismissed the appeal. This

Court agreed and held that the second prong of *Cohen* is not triggered by a discovery sanctions order stating:

> . . . [A] Rule 37(a) sanctions order often will be inextricably intertwined with the merits of the action. An evaluation of the appropriateness of sanctions may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response. . . . Such an inquiry would differ only marginally from an inquiry into the merits and counsels against application of the collateral order doctrine. Perhaps not every discovery sanction will be inextricably intertwined with the merits, but we have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral.

*Cunningham*, 527 U.S. at 206-07 (citations omitted).

If an order sanctioning a failure to produce discovery often will be inextricably intertwined with the merits because of the necessity of examining the substance of the discovery order, then a discovery order is often inextricably intertwined with the merits for the same reason. Indeed, in this case, the District Court held that Mohawk had impliedly waived the privilege because of positions asserted to it in a brief because Mohawk "placed the actions of Attorney Morillo at issue" and because fairness requires an examination of those actions and communications. Pet. App., p. 51a. The District Court could not make such a finding completely divorced from examining the merits. Indeed, to determine what "fairness" in the case requires, and whether a party has placed a privileged communication "at issue" in the case, it is necessary to determine if it relates to the merits of the suit and it is common for the parties to disagree what issues affect the merits.

It is not the case that the appellate court must resolve the merits in order for its exercise of jurisdiction over it to violate the second prong of *Cohen*. Instead, it must only be established that its role is not "completely separate from the merits." Moreover, the fact that a particular discovery order may not sufficiently call for an examination of the merits is not dispositive under *Cunningham*. Instead, if reviewing the type of order at issue "will often" intertwine the appellate court with the merits, the second prong is not met. In *Cunningham*, this Court in essence held that discovery orders will often touch on the merits and thus they cannot trigger *Cohen* review – this is presumably why this Court has never applied the doctrine to allow immediate appeal of a discovery order. In essence, this Court already has rejected Mohawk's argument in *Cunningham*.

Moreover, as the Eleventh Circuit recognized, Mohawk cannot meet the third *Cohen* prong. If the District Court erred in its discovery order, that decision is fully appealable by Mohawk at the conclusion of the litigation. *Boughton*, 10 F.3d at 749 (holding that a discovery order involving privilege issues was not appealable under the collateral order doctrine because, among other things, "[t]he practical consequences of the district court's decision on the controversy between the parties can be effectively reviewed on direct appeal following a judgment on the merits. If this court determines that privileged documents were wrongly turned over to the plaintiffs and were used to the detriment of defendants at trial, we can reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed documents. . . .")

Mohawk responds to this view of the vast majority of the circuits by arguing that the "cat is out of the bag," even with a reversal and a new trial that prevents Carpenter from relying on any privileged information (or information gained from privileged information). This argument does not survive under close scrutiny. The primary harm to Mohawk if the District Court is wrong (and it clearly was not wrong) is that Carpenter gets to use the privileged communications to undermine Mohawks' defenses and prevail at trial. If the order were reversed after a final judgment, Carpenter would have to seek to prevail without that evidence and the essential harm to Mohawk would be remedied. Mohawk's contention that it would still suffer egregious harm because it was required to produce documents that Carpenter could not use at trial is simply unsupported.

Moreover, virtually every discovery order – if reversed after final judgment – leaves some residual harm to the producing party. There is nothing unique about the attorney-client privilege with respect to that effect. Mohawk's argument could apply to any claim for privilege or confidentiality – objections raised in response to a substantial number if not most discovery requests in federal court today.

Indeed, if a party loses even a burdensomeness objection and must spend substantial money and time producing requested documents, a reversal of that discovery order will not reimburse the producing party its lost money and time.

At the end of its Petition, Mohawk argues that, with respect to its "cat out of the bag" argument, an incorrect discovery order not involving a privilege objection is distinguishable from an order involving a privilege objection because, with respect to the former, "the parties were entitled to that information in the first instance through lawful discovery under Rule 26" but, with respect to the latter, "privileged information . . . is not discoverable and opposing counsel and parties never had any entitlement to the privileged information in the first place." Mohawk's distinction is without a difference.

With respect to *any* objection to discovery, the objecting party is contending that the requesting party does not have entitlement to the discovery in the first place. And if the requesting party moves to compel that discovery, it is always contending that it is entitled to the discovery under Rule 26. Moreover, where the District Court orders the discovery to be produced, it is always holding that the requesting party was correct and that it was indeed entitled to the discovery in the first place under Rule 26.

The discovery order here is no different – the District Court held that Carpenter was entitled to the privileged information under Rule 26 – because of a waiver. The same result would have occurred if it had determined that the communications at issue were not privileged. If a party obtains discovery that should not have been produced but was subject to production because of an incorrect discovery order, that party always obtains what Mohawk contends to be an "unfair advantage" as it still has knowledge of that discovery. Even with a reversal of a verdict in favor of that party and the order of a new trial, the party who obtained the discovery still has some advantage because of its knowledge of the existence and substance of the discovery that was produced in response to the reversed discovery order. However, to require that the entire cat must be returnable to the bag would require that virtually every discovery order be subject to immediate appeal – effectively reversing the final judgment rule.

In sum, there will almost always be some unremedied harm to the losing party even if the discovery order is reversed on appeal. But a virtual evisceration of the final judgment rule is not warranted just because all the hairs of the cat cannot be stuffed back into the bag after a final judgment. The important question in interpreting the very narrow collateral order doctrine is whether the remedy will realistically prevent a new trial or risk the effectiveness of the functioning of government.

◆

## CONCLUSION

For the reasons stated herein, the Respondent respectfully requests that the Court deny Petitioner's Petition.

Respectfully submitted,

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# REPLY
# BRIEF

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(3)

No. 08-678

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

*Petitioner,*

*v.*

NORMAN CARPENTER,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# REPLY BRIEF

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## QUESTION PRESENTED

Whether a party has an immediate appeal of district court's order finding waiver of the attorney-client privilege and compelling production of privileged materials under the collateral order doctrine, as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

## RULE 29.6 DISCLOSURE STATEMENT

Petitioner, Mohawk Industries, Inc. ("Mohawk") states that it is a publicly-traded corporation incorporated under the laws of Delaware. Mohawk has no parent corporation, and no publicly-traded company owns ten percent or more of its stock.

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## REPLY BRIEF

Respondent's Brief in opposition illustrates precisely why the Court should grant this Petition. Respondent admits a deep conflict exists among the courts of appeals on the question presented. Indeed, Respondent suggests that the conflict is even more developed (nine to three) than set forth in the Petition. Respondent's principal argument, however, is that this Court should ignore the conflict based on pure conjecture that the Third Circuit might – sometime – reverse itself and erase a leading decision on the question presented, *Kelly v. Ford Motor Co., (In re Ford Motor Co.)*, 110 F.3d 954 (3rd Cir. 1997). Respondent then suggests without any basis, that the Ninth and D.C. Circuits inexplicably will reverse course as well. On Respondent's view, this Court would never again accept a case to resolve a conflict among the circuits because it should expect them to simply disappear on their own.

This case presents an opportunity to review an important question that has and does divide the courts of appeals. Respondent's only real basis to oppose *certiorari* is to argue that Mohawk is wrong on the merits of how to resolve the conflict. As set forth in the Petition, the privilege waiver here is subject to appellate review under the collateral order doctrine set forth in *Cohen*. Respondent's merits objections to collateral order jurisdiction are just that—objections this Court should consider following the grant of the Petition.

## ARGUMENT

### I. There is a deep and irreconcilable conflict among the courts of appeals on the question presented.

Respondent explicitly acknowledges that the courts of appeals are divided on the question presented. Response to Petition, pp. 14-16.[1] As set forth in the Eleventh Circuit's opinion and in the Petition, the conflict now involves at least ten circuits, with at least seven refusing to permit collateral order jurisdiction and three circuits permitting jurisdiction. Appendix A, pp. 9a-10a; Mohawk Petition, pp. 9-14. Respondent explicitly accepts this breakdown, but suggests an even deeper conflict, contending that both the Sixth and Fourth Circuits have also made statements adopting the majority position. Response to Petition, pp. 14-16. Even if the Respondent were correct,[2] the conflict would be even more well-developed than as set forth in the Petition.

---

[1] Before addressing the conflict among the circuits, Respondent spends considerable time arguing the merits of the underlying case. Response to Petition, pp. 1-9. The merits of Respondent's allegations against Mohawk are entirely irrelevant to this Petition. Rather, the relevant issue and arguments surround whether appellate jurisdiction exists under *Cohen.*

[2] In *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005), the Sixth Circuit allowed immediate review of a discovery order involving the attorney-client privilege under *Perlman v. United States*, 247 U.S. 7 (1918), and did not address the question presented in this case. Though more to the point of the present appeal, *United States v. In the Matter of The Search of 235 S. Queen St., Martinsburg*, W.V., No. 07-5144, 2008 WL 4809458 (4th Cir. Nov. 4, 2008), was an unpublished opinion of the Fourth Circuit.

Nonetheless, Respondent suggests that this conflict is one that is "crumbling and will likely die on its own." *Id.*, p. 19. Respondent supports this theory based on pure speculation that the Third Circuit will eventually reverse *Ford* and that the Ninth and D.C. Circuits will then simply follow suit. Response to Petition, pp. 16-20.

To the contrary, the Third Circuit has repeatedly reaffirmed *Ford* and followed its holding. *See e.g.*, *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 357-58 (3rd Cir. 2007) (citing *Ford* and finding jurisdiction under the collateral order doctrine to review district court's order requiring party to produce allegedly privileged documents and stating "in this context, we have little trouble concluding that we have jurisdiction over this appeal."); *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen*, 57 Fed.Appx. 58, 59 (3rd Cir. 2003) (citing *Ford*, the court stated that "We have jurisdiction pursuant to the collateral order doctrine over discovery orders compelling disclosure of material that may be protected by the work product doctrine or attorney-client privilege."); *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 53 (3rd Cir. 2000) ("We have held [in *Montgomery* and *In re Ford*] that the requirements of the collateral order doctrine are satisfied when a party appeals a discovery order involving information which the party claims to be privileged . . ."); *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 300 (3rd Cir. 1999) ("*In re Ford Motor Co.* established a bright-line rule permitting appeals from discovery orders requiring the disclosure of content putatively privileged by the attorney-client and work-product privileges."). None of these cases have ever suggested that *Ford* should be overruled *en banc*, nor given any indication that *Ford* is not proper and binding precedent. Simply, no evidence suggests that the Third Circuit will reverse *Ford*.

Even if this Court were to entertain the possibility that the Third Circuit will eventually overturn *Ford*, it is an even further stretch to assume that the Ninth and D.C. Circuits will choose to follow suit. While Respondent acknowledges that the D.C. and Ninth Circuits have taken the minority position on this issue, prior to the decision below these were the most recent courts to address the question (in 2003 and 2007, respectively). When confronting a six to one split, these circuits took the minority position and only deepened the conflict. Both courts carefully analyzed the issue. In *United States v. Philip Morris, Inc.*, the D.C. Circuit specifically recognized that the position they chose to take was a minority position. *Philip Morris*, 314 F.3d 612, 619-20 (D.C. Cir. 2003). And the Ninth Circuit's decision does not even cite to or rely upon the decision in *Ford*. *UMG Recording, Inc. v. Bertelsmann AG (In re Napster)*, 479 F.3d 1078 (9th Cir. 2007). Respondent does not point to any opinions from either of those circuits to suggest that reversal is even remotely likely.

In light of the recent decisions of the D.C., Ninth and Eleventh Circuits on the question presented, Respondent's contention that the conflict on this question is "crumbling" is without merit. Likewise, the suggestion that the conflict will die and that three courts of appeals will reverse themselves is without merit as well. There is a deep and well-developed conflict among the courts of appeals on an important jurisdictional question that this Court has never addressed.[3]

---

[3] This Court may be reluctant to grant a petition in a case like this one from a circuit in the majority position. Granting a petition from a circuit that has denied jurisdiction, however, provides a superior vehicle for appellate review because the jurisdictional question is presented in a cleaner fashion. Here, the court of appeals did not pass on the merits of the underlying privilege dispute in deciding the *Cohen* issue. If the Court were to wait for a case from the Third, Ninth, or D.C. Circuits, those courts would have found collateral order jurisdiction and then upheld the merits of the privilege claim (reversing the trial court). (If those courts were to deny the privilege claims, appellees in those circuits will have prevailed and would not have occasion to file petitions for certiorari challenging appellate jurisdiction.) If a court of appeals permitted jurisdiction and found the district court erred in compelling the production of privileged materials, this Court could grant certiorari and reverse on jurisdictional grounds, putting the Court in the unenviable and unfortunate position of compelling the production of privileged materials based entirely on a jurisdictional issue, where the court of appeals had already found the district court wrongly compelled the production of the privileged materials. The Court should grant certiorari in this case, which cleanly presents the jurisdictional issue without the complications of a decision on the merits of the privilege claim in the court of appeals.

## II. This Petition concerns the important question of collateral order jurisdiction to allow the review of orders finding waiver of the attorney-client privilege.

Without any real basis to oppose the Petition, Respondent turns to the merits of the question presented, contending that permitting collateral order jurisdiction will eviscerate the final judgment rule and open the appellate floodgates. Response to Petition, pp. 23, 30. This, however, is an argument on the ultimate question presented, and a flawed one at that. Regardless, such fears are unfounded. First, this Petition does not stem from a "standard discovery dispute" as Respondent suggests. Response to Petition, pp. 1, 4. Rather, the order at issue is an order finding that Mohawk waived the attorney-client privilege based on three sentences contained in a brief in another case.[4] Thus, Mohawk is seeking appellate review for the sole purpose of protecting the attorney-client privilege which, as set forth in Mohawk's Petition, is an important issue, particularly in the context of internal investigations like the one that occurred in this case. Additionally, Respondent cites nothing from the Third, Ninth or D.C. Circuits that suggests collateral order review has resulted in an increase or abundance of privilege appeals.

---

[4] Respondent has given this Court the false impression that the District Court's based its finding of waiver on *fourteen sentences* contained in a brief filed in the *Williams* class action case. Response to Petition, pp. 6-7. That is wrong. Though the District Court did quote a lengthy excerpt of the *Williams* brief in the "Background" section of the discovery opinion, only three sentences of that excerpt were quoted in the waiver section of the opinion. Mohawk Petition, Appendix B, pp. 18a-19a, 51a. Those were clearly the three sentences relied on by the District Court in finding that the privilege had been waived. The remaining portions of the excerpt were merely presented and identified as "Background."

Respondent further re-writes the question presented to be unduly broad and reach all discovery disputes. Respondent's efforts to expand the question presented and, in turn, argue that granting the Petition and reversing the Eleventh Circuit will greatly expand collateral order jurisdiction are without merit. And as set forth in the Petition, this Question is precisely the type that satisfies the *Cohen* test and Respondent's response does not undermine any of those arguments.

Finally and contrary to Respondent's suggestions, this Court's decisions in *Church of Scientology of California v. United States*, 506 U.S. 9 (1992) and *Cunningham v. Hamilton County*, 527 U.S. 198 (1999) have not decided the question presented. Nor does any holding in those cases preclude review here. First, *Church of Scientology* is not a collateral order case. The issue in that case was whether an IRS subpoena was moot since the requested information had already been turned over to the IRS. *Church of Scientology*, 506 U.S. at 12. While *Cunningham* is a collateral order case, it has absolutely nothing to do with waiver of the attorney-client privilege. *Cunningham* involved a sanctions order that resulted in the disqualification of plaintiff's counsel. The Court held that such an order was not immediately appealable under the collateral order doctrine. *See Cunningham*, 527 U.S. at 202. *Cunningham* does not, however, resolve the question presented as waiver of the attorney-client privilege was in no way implicated in the case. As such, *Cunningham* does not preclude review. To the contrary it serves as one of many examples of this Court granting *certiorari* to resolve a question of collateral order jurisdiction.

## CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant the Petition to resolve the conflict among the courts of appeals.

Respectfully submitted,

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# JOINT APPENDIX

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No. 08-678

IN THE
# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

*Petitioner,*

*v.*

NORMAN CARPENTER,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 20, 2008
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# APPENDIX A — RELEVANT DOCKET ENTRIES OF THE NORTHERN DISTRICT OF GEORGIA (ROME DIVISION)

## U.S. DISTRICT COURT
## NORTHERN DISTRICT OF GEORGIA (ROME)

CARPENTER

v.

MOHAWK INDUSTRIES, INC. ET AL

**No. 4:07-cv-00049-HLM**

| Date Filed | # | Docket Text |
|---|---|---|
| 03/15/2007 | 1 | COMPLAINT with jury demand filed by Norman Carpenter. Consent form to proceed before U.S. Magistrate and pretrial instructions provided. (Filing fee $350 receipt number 366124) (Attachments: # 1 Civil Cover Sheet & Copy of Receipt)(bjh) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 03/15/2007) |
| 04/17/2007 | 9 | MOTION to Dismiss with Brief In Support by Mohawk Industries, Inc. (Attachments: # 1 Brief Brief in Support of Motion to Dismiss)(Rhoads, Leigh) (Entered: 04/17/2007) |

| **Date Filed** | **#** | **Docket Text** |
|---|---|---|
| 05/01/2007 | 10 | First AMENDED COMPLAINT against all defendants, filed by Norman Carpenter. (Munger, Thomas) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 05/01/2007) |
| 05/01/2007 | 11 | RESPONSE in Opposition re 9 MOTION to Dismiss filed by Norman Carpenter.(Munger, Thomas) (Entered: 05/01/2007) |
| 05/02/2007 | 12 | First AMENDED COMPLAINT against all defendants, filed by Norman Carpenter. (Munger, Thomas) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 05/02/2007) |
| 05/02/2007 | 14 | ORDER denying as moot and without prejudice 9 Motion to Dismiss by Deft Mohawk Industries, Inc. Signed by Judge Harold L. Murphy on 5/2/07. (bjh) (Entered: 05/02/2007) |
| 05/17/2007 | 16 | Initial Disclosures by Norman Carpenter. (Munger, Thomas) (Entered: 05/17/2007) |

| **Date Filed** | **#** | **Docket Text** |
|---|---|---|
| 05/17/2007 | 18 | Joint PRELIMINARY REPORT AND DISCOVERY PLAN filed by Mohawk Industries, Inc.. (Diffley, Daniel) (Entered: 05/17/2007) |
| 05/17/2007 | 20 | Initial Disclosures by Mohawk Industries, Inc..(Diffley, Daniel) (Entered: 05/17/2007) |
| 05/18/2007 | 21 | SCHEDULING ORDER approving 18 Joint Preliminary Report and Discovery Plan. Signed by Judge Harold L. Murphy on 5/18/07. (bjh) (Entered: 05/18/2007) |
| 05/18/2007 | 22 | First ANSWER to Amended Complaint by Mohawk Industries, Inc.. Discovery ends on 10/15/2007. (Rhoads, Leigh) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 05/18/2007) |
| 06/18/2007 | 23 | CERTIFICATE OF SERVICE *Of Plaintiff's First Interrogatories To Defendant Mohawk Industries, Inc.* by Norman Carpenter.(Munger, Thomas) (Entered: 06/18/2007) |

| **Date Filed** | **#** | **Docket Text** |
|---|---|---|
| 06/18/2007 | 24 | CERTIFICATE OF SERVICE *of Plaintiff's First Request For Production of Documents To Defendant Mohawk Industries, Inc.* by Norman Carpenter. (Munger,Thomas) (Entered: 06/18/2007) |
| 06/18/2007 | 25 | CERTIFICATE OF SERVICE *of Defendant's First Request for Production to Plaintiff Norman Carpenter, Defendant's First Set of Interrogatories to Plaintiff Norman Carpenter, Notice of Deposition of Plaintiff Norman Carpenter, Notice of Deposition of Christina Martinez* by Mohawk Industries, Inc.. (Rhoads, Leigh) (Entered: 06/18/2007) |
| 07/30/2007 | 28 | CERTIFICATE OF SERVICE *of Defendant's Objections and Responses to Plaintiff's First Requests for Production, Defendant's Objections and Responses to Plaintiff's First Interrogatories* by Mohawk Industries, Inc.. (Rhoads, Leigh) (Entered: 07/30/2007) |

| **Date Filed** | **#** | **Docket Text** |
|---|---|---|
| 08/28/2007 | 29 | CERTIFICATE OF SERVICE *Of Plaintiff's Second Interrogatories* by Norman Carpenter. (Munger, Thomas) (Entered: 08/28/2007) |
| 08/28/2007 | 30 | CERTIFICATE OF SERVICE *Second Request For Production Of Documents* by Norman Carpenter. (Munger, Thomas) (Entered: 08/28/2007) |
| 08/29/2007 | 31 | MOTION to Compel Responses To Plaintiff's First Interrogatories And Request ToProduce Documents That Mohawk Contends Are Protected By The Attorney-Client Privilege with Brief In Support by Norman Carpenter. (Attachments: # 1 Brief Brief In Support Of Motion To Compel # 2 Exhibit Exhibit A To Brief In Support Of MotionTo Compel # 3 Exhibit Exhibit B To Brief In Support Of Motion To Compel) (Munger, Thomas) (Entered: 08/29/2007) |

| Date Filed | # | Docket Text |
|---|---|---|
| 08/29/2007 | 32 | MOTION for Protective Order with Brief In Support by Mohawk Industries, Inc.. (Attachments: # 1 Exhibit A- Certificate of Good Faith Conferral# 2 Exhibit B Proposed Protective Order # 3 Brief In Support of Motion for Protective Order # 4Exhibit A to Brief in Support of Motion for Protective Order # 5 Exhibit B to Brief in Support of Motion for Protective Order # 6 Exhibit C to Brief in Support of Motion forProtective Order # 7 Exhibit D to Brief in Support of Motion for Protective Order # 8Exhibit E to Brief in Support of Motion for Protective Order) (Diffley, Daniel) (Entered: 08/29/2007) |
| 09/06/2007 | 33 | RESPONSE in Opposition re 32 MOTION for Protective Order filed by Norman Carpenter. (Munger, Thomas) (Entered: 09/06/2007) |
| 09/07/2007 | 34 | MOTION for Leave to File Opposition to Mohawk Industries, Inc.'s Motion forProtective Order. (Attachments: # 1 Exhibit A # 2 Exhibit B# 3 Exhibit C# 4 Exhibit D) (Doherty, Ronan) (Entered: 09/07/2007) |

| Date Filed | # | Docket Text |
|---|---|---|
| 09/10/2007 | 35 | ORDER granting Plaintiffs' 34 Motion for Leave to File Opposition to Mohawk Industries, Inc.'s Motion for Protective Order by 9/14/07. Defendant may respond w/ in 10 days after its filing. Signed by Judge Harold L. Murphy on 9/10/ 07. (bjh) (Entered: 09/11/2007) |
| 09/14/2007 | 36 | RESPONSE in Opposition re 31 MOTION to Compel Responses To Plaintiff's FirstInterrogatories And Request To Produce Documents That Mohawk Contends AreProtected By The Attorney-Client Privilege filed by Mohawk Industries, Inc.. (Attachments: # 1 Exhibit A—Perillo Declaration # 2 Exhibit B—Mohawk PrivilegeLog# 3 Exhibit C—4/19/07 Letter from Allen to Munger)(Rhoads, Leigh) (Entered: 09/14/2007) |
| 09/14/2007 | 37 | RESPONSE in Opposition re 32 MOTION for Protective Order filed by Shirley A.Williams, Gale Pelfrey, Bonnie Jones. (Attachments: # 1 Exhibit A# 2 Exhibit B # 3 Exhibit C# 4 Exhibit D) (Doherty, Ronan) (Entered: 09/14/2007) |

| **Date Filed** | **#** | **Docket Text** |
|---|---|---|
| 09/19/2007 | 38 | REPLY BRIEF re 31 MOTION to Compel Responses To Plaintiffs First Interrogatories And Request To Produce Documents That Mohawk Contends Are Protected By The Attorney-Client Privilege filed by Norman Carpenter. (Munger, Thomas) (Entered: 09/19/2007) |
| 09/24/2007 | 39 | REPLY BRIEF re 32 MOTION for Protective Order filed by Mohawk Industries, Inc.. (Rhoads, Leigh) (Entered: 09/24/2007) |
| 09/25/2007 | 40 | ORDER denying Deft Mohawk's request for oral argument, as contained in the body of its 39 Reply Brief in support of its Motion for Protective Order. Signed by JudgeHarold L. Murphy on 9/25/07. (bjh) (Entered: 09/25/2007) |
| 09/28/2007 | 42 | ORDER denying Deft Mohawk's request for oral argument, as contained in the body of its Response Brief in Opposition to Pla's Motion to Compel. N.D. Ga L.R. 7.1E "Motions will be decided by the Court without oral hearing, unless a hearing is ordered by the Court". Signed by Judge Harold L. Murphy on 9/28/07. (bjh) (Entered: 09/28/2007) |

| **Date Filed** | **#** | **Docket Text** |
|---|---|---|
| 10/01/2007 | 43 | ORDER granting Pla's 31 Motion to Compel Responses and ORDERS Deft Mohawk to provide full responses as outlined in this Order. The Court further ORDERS Deft Mohawk to produce notes taken by Atty Morillo's asst. during the interview of Mr.Carpenter, if such notes exist, w/in 45 days. Granting in part and denying in part Deft Mohawk's 32 Motion for Protective Order as outlined in this Order. Signed by Judge Harold L. Murphy on 10/1/07. (bjh) (Entered: 10/01/2007) |
| 10/01/2007 | 44 | CERTIFICATE OF SERVICE *of Defendant's Objections and Responses to Plaintiff's Second Requests for Production, Defendant's Objections and Responses to Plaintiff's Second Interrogatories* by Mohawk Industries, Inc.. (Rhoads, Leigh) (Entered:10/01/2007) |
| 10/11/2007 | 45 | Joint MOTION for Extension of Time to Complete Discovery by Norman Carpenter. (Munger, Thomas) (Entered: 10/11/2007) |

| Date Filed | # | Docket Text |
|---|---|---|
| 10/12/2007 | 46 | ORDER granting 45 Joint Motion for Extension of Time to Complete Discovery. Discovery ddl reset to 12/17/2007. Signed by Judge Harold L. Murphy on 10/12/07.(bjh) (Entered: 10/12/2007) |
| 10/31/2007 | 48 | NOTICE OF APPEAL as to 43 Order on Motion to Compel, Order on Motion for Protective Order,, by Mohawk Industries, Inc.. Filing fee $455, receipt number 113E000 0000001399326. Transcript Order Form due on 11/15/2007 (Rhoads, Leigh) (Entered: 10/31/2007) |
| 12/13/2007 | 52 | Consent MOTION for Extension of Time to Complete Discovery by Mohawk Industries, Inc.. (Diffley, Daniel) (Entered: 12/13/2007) |
| 12/17/2007 | 53 | ORDER granting 52 Joint Motion for Extension of Time to Complete Discovery until 90 days following the final resolution by the Court of Appeals of Deft Mohawk's appeal and Mandamus Petition. Signed by Judge Harold L. Murphy on 12/17/07. (bjh) (Entered: 12/17/2007) |

| **Date Filed** | **#** | **Docket Text** |
|---|---|---|
| 08/27/2008 | 58 | Certified copy of ORDER of USCA re: 48 Notice of Appeal filed by MohawkIndustries, Inc. This Appeal is DISMISSED for Lack of Jurisdiction, and Mohawk'sPetition for Writ of Mandamus is DENIED. Case Appealed to USCA 11th Circuit; Case Number 07-15208-GG. (Attachment: # 1 USCA Cover Letter) (bjh) (Entered: 08/27/2008) |
| 10/09/2008 | 60 | Copy of ORDER of USCA re 48 Notice of Appeal filed by Mohawk Industries, Inc. The motion of Appellant, Mohawk Industries, Inc., for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 11/24/2008, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that w/in the period above mentioned there shall be filed w/the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of acopy of an order of the Supreme Court |

| Date Filed | # | Docket Text (cont'd) |
|---|---|---|
| | | denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed w/the Clerk of this Court w/in that time. Case Appealed to USCA 11th Circuit Case Number 07-15208-GG. (Attachment: # 1 Letter from USCA) (bjh) (Entered: 10/09/2008) |

# APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NORMAN CARPENTER,

Plaintiff-Appellee,

versus

MOHAWK INDUSTRIES, INC.,

Defendant-Appellant,

PATRICIA SILVERS,
JEFFERY BRIGGS, et al.,

Defendants.

**No. 07-15208-GG**

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 11/07/2007 | DKT7CIV (Docketing Notice confirming brief due date) issued. To: Leigh R. Rhoads;<br>c: Benjamin A. Stone;<br>c: Daniel F. Diffley;<br>c: James N. Hatten;<br>c: Randall Allen;<br>c: Ronan P. Doherty;<br>c: Thomas J. Munger | | No |
| 11/26/2007 | Appellee's Mot. to Dism. for Lack of Appellate Juris.: (Atty: Thomas J. Munger) | Norman Carpenter | No |
| 12/06/2007 | Appellant Mohawk Industries, Inc.'s response to Appellee's Motion to Dismiss: (Atty: Daniel F. Diffley) | Mohawk Industries, Inc. | No |
| 12/11/2007 | Reply in Support of Motion to Dismiss Appeal: (Atty: Thomas J. Munger) | Norman Carpenter | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 12/17/2007 | Appellant Brief Filed: (Atty: Daniel F. Diffley) | Mohawk Industries, Inc. | No |
| 12/17/2007 | Record Excerpts: (Atty: Daniel F. Diffley) | Mohawk Industries, Inc. | No |
| 01/22/2008 | Appellee Brief Filed: (Atty: Thomas J. Munger) | Norman Carpenter | No |
| 01/25/2008 | Record on Appeal | | No |
| 01/31/2008 | Mohawk Industries' motion to dismiss No. 07-15208 is CARRIED WITH THE CASE. . .On its own motion, the Court CONSOLIDATES No. 07-15691 with No. 07-15208 and CARRIES the pet for writ of mandamus with the case...(SEE FILE) SHB/EEC/RB | | No |
| 02/08/2008 | Reply Brief Filed: (Atty: Daniel F. Diffley) | Mohawk Industries, Inc. | No |

| File Date | Entry | Party | Pending |
|---|---|---|---|
| 03/31/2008 | Sua Sponte Order: On 1/31/08, this court consolidated case 07-15208 & 07-15691 . . .Appellee has not had chance to respond to mandamus petition. . .Appellee is directed to file w/in 14 days a supp. brief no than 15 pgs. in response. . .see file for order | | No |
| 04/07/2008 | Supplemental Appellee Brief: (Atty: Thomas J. Munger) | Norman Carpenter | No |
| 05/20/2008 | Oral Argument Scheduled: 05/20/08 | | No |
| 08/26/2008 | CORRECTED ORDER(Published): . . .Appellee's motion to Dismiss Appeal for lack of jurisdiction is GRANTED. Mohawk's petition for writ of mandamus is DENIED. EEC/SM/SCB | | No |

| **File Date** | **Entry** | **Party** | **Pending** |
|---|---|---|---|
| 09/16/2008 | Motion to Stay Mandate: (Atty: Daniel F. Diffley) | Mohawk Industries, Inc. | No |
| 09/23/2008 | Opposition to Appellant Motion to Stay Mandate: (Atty: Thomas J. Munger) | Norman Carpenter | No |
| 10/08/2008 | The motion of Appellant, Mohawk Industries, Inc., for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including November 24, 2008. . .(EEC) | | No |
| 11/28/2008 | Notice of Filing Certiorari 08-678: (Atty: Daniel F. Diffley) | Mohawk Industries, Inc. | No |
| 01/29/2009 | Certiorari Granted 08-678: (Atty: Daniel F. Diffley) | Mohawk Industries, Inc. | No |

# APPENDIX C — COMPLAINT, FILED MARCH 15, 2007

## UNITED STATES DISTRICT COUR FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

NORMAN CARPENTER,

Plaintiff

vs.

MOHAWK INDUSTRIES, INC.; PATRICIA SILVERS;
JEFFERY BRIGGS; SCOTT HIGGINS;

Defendants.

## ACTION UNDER 42 U.S.C. § 1985(2) AND CLAIMS UNDER GEORGIA LAW

## JURY TRIAL DEMANDED

### *COMPLAINT*

Plaintiff Norman Carpenter ("Plaintiff" or "Carpenter") brings this action against Defendants Mohawk Industries, Inc. ("Mohawk") and Mohawk executives/managers Patricia Silvers, Jeffery Briggs, and Scott Higgins. Plaintiff shows the Court as follows:

## *OVERVIEW*

1. Plaintiff, a former Mohawk Shift Supervisor, was injured, including by being terminated, through a conspiracy between Mohawk, Silvers, Briggs, Higgins, and others to deter and prevent him from testifying and/or from testifying truthfully and freely in a major class action lawsuit against Mohawk pending in this Court. Defendants' conduct violated 42 U.S.C. § 1985(2) and was tortious under Georgia law.

## *JURISDICTION AND VENUE*

2. This is a civil action over which original, federal question jurisdiction is vested in this Court by virtue of 28 U.S.C. §§ 1331, § 1343(a), and §1367.

3. Venue is appropriate in this Court under 28 U.S.C. § 1391 as this action is brought in a judicial district in which the defendants reside or may be found at the time the action is commenced. Further, Plaintiff resides and was employed by Defendant Mohawk, in a county within the Northern District of Georgia, Rome Division.

## *THE PARTIES*

4. Plaintiff Norman Carpenter resides at 1700 Willow Oak Lane, No. 27, Dalton, Georgia 30721. He was employed as a Shift Supervisor for Defendant Mohawk from June 2006 until December 5, 2006.

5. Defendant Mohawk is the second largest carpet and rug manufacturer in the United States. Mohawk's net sales in 2005 exceeded $6.6 billion. Mohawk employs more than 37,000 employees, most of who are employed in Northwest Georgia. Mohawk owns or leases a number of facilities in Georgia.

6. Mohawk is incorporated in Delaware and its principal place of business is in Calhoun, Georgia.

7. Defendant Patricia Silvers is employed by Mohawk as an executive in Mohawk's Human Resources Department and is the highest-ranking Human Resources Executive in Mohawk's Home Division in Calhoun, Georgia.

8. Defendant Scott Higgins is a Plant Manager employed by Mohawk who was the direct supervisor of Carpenter at the time of the termination of Carpenter's employment with Mohawk on December 5, 2006.

9. Defendant Jeffery Briggs is a Vice President employed by Mohawk who was the direct supervisor of Defendant Higgins at the time of the termination of Carpenter's employment with Mohawk on December 5, 2006.

## *FACTUAL ALLEGATIONS*

### A. ***The Mohawk RICO/IRCA Class Action***

10. On January 6, 2004, four formerly hourly Mohawk employees and one current Mohawk hourly employee ("the *Williams* Plaintiffs") filed a class action lawsuit against Mohawk in this Court, *Williams v. Mohawk Industries, Inc.*, United States District Court for the Northern District of Georgia, Rome Division, Civil Action File No. 4:04-CV-0003-HLM ("the *Williams* Lawsuit").

11. In the *Williams* Lawsuit, the *Williams* Plaintiffs allege that Mohawk has violated the federal RICO and the Georgia Racketeer Influenced and Corrupt Organizations Act, § 16-14-4(a) ("Georgia RICO") by engaging in an illegal racketeering enterprise with a group of independent hiring and/or recruiting firms ("the Enterprise") to conspire to violate various provisions of the Immigration and Nationality Act, 8 U.S.C.A. § 1324 ("INA").

12. The *Williams* Plaintiffs allege that the Mohawk-hiring agency Enterprise has conspired to violate INA provisions that make it a federal crime to (1) "knowingly hire for employment at least 10 individuals with actual knowledge that the individuals are aliens" during a 12 months period; (2) "conceal, harbor, or shield from detection or attempt to conceal, harbor or shield from detection" aliens who have illegally entered the United States; and (3) "encourage or induce an alien" to enter

the United States knowing or in reckless disregard to the fact that such entry is or will be a violation of the law. 8 U.S.C.A. § 1324(a).

13. The *Williams* Plaintiffs further allege that Mohawk arranges with the hiring agencies to have the hiring agencies refer to them, for hire, illegal aliens to work at Mohawk facilities. They allege that a part of the racketeering enterprise is a conspiracy to engage in a cover up to hide these actions, including by the destruction of documents and the concealment of evidence that would reveal the Enterprise and its illegal actions.

14. The *Williams* Plaintiffs allege that Mohawk is motivated to engage in this illegal enterprise by the fact that it allows Mohawk to flood the available labor pool with illegal aliens and thereby provide suppressed wages and benefits to its employees, including its employees who are legally entitled to work in the United States. The *Williams* Plaintiffs allege that they are directly injured by this illegal enterprise by the effect that it depresses their wages at Mohawk.

15. If the *Williams* Class is certified under Fed. R. Civ. P. 23, Mohawk knows it is at least facing staggering potential financial liability to the class members. For this reason, the *Williams* Lawsuit has become the biggest concern and source of attention of the management of Mohawk.

16. Highlighting the central importance of the *Williams* Lawsuit to the economic health of Mohawk, in Mohawk's November 3, 2006 Form 10-Q filed with the Securities and Exchange Commission, Mohawk included a lengthy paragraph about the *Williams* Lawsuit in its Notes To Condensed Consolidated Financial Statements. Moreover, in the Legal Proceedings section of Mohawk's November 3, 2006 Form 10-Q, it discusses only one lawsuit it is facing and it discusses it at length - the *Williams* Lawsuit.

17. To defend the landmark *Williams* Lawsuit, Mohawk retained Sidley Austin. Mohawk retained as lead litigation counsel from Sidley Austin Juan P. Morillo. Esq.

18. Mr. Morillo is not licensed to practice law in Georgia but has been admitted *pro hac vice* to represent Mohawk in Georgia solely for purposes of representing Mohawk in the *Williams* Lawsuit.

19. After retaining Mr. Morillo, on February 9, 2004, Mohawk filed a motion to dismiss the *Williams* Plaintiffs' claims under federal RICO and Georgia RICO. On April 12, 2004, this Court denied Mohawk's motion to dismiss those claims. After substantial appeals, this Court's denial of Mohawk's Motion to Dismiss was affirmed and the discovery period is now open in the *Williams* case.

20. Since October 2005, Mohawk has been poised for the onset of discovery the most important and threatening lawsuit in its corporate history.

### B. *The Events Relating To Plaintiff Carpenter*

21. In June 2006, Mohawk hired Plaintiff Norman Carpenter ("Carpenter") as a Shift Supervisor at one of its Calhoun facilities referred to as the Union Grove Road Facility. During his employment with Mohawk, Carpenter reported to the Plant Manager. During his tenure, the Plant Manager was Kevin Palmer followed by Defendant Scott Higgins. The Plant Manager, in turn, reported to Vice President and Defendant Jeff Briggs.

22. Carpenter was an outstanding supervisor and he increased productivity and efficiency on his Shift. During his employment with Mohawk, he had little interaction with Mohawk's corporate offices. He was instead focused on managing his team on his Shift.

23. As a Shift Supervisor, Carpenter supervised approximately 125 hourly Mohawk employees. The hiring of the individuals that Carpenter Supervised was handled entirely by Mohawk's Human Resources Department and Carpenter had no role in the recruitment, screening or hiring of anyone working at Mohawk. Indeed, almost all of these employees were hired before Carpenter became employed at Mohawk.

24. At the time he was hired, and for the vast majority of the time that he was employed at Mohawk, Carpenter believed that all of the hourly employees he supervised were legally entitled to work in the United States.

25. During his employment, Carpenter understood that all but approximately 12 to 15 of the individuals working for him on his shift were directly employed by Mohawk. He understood that the other 12 to 15 of the individuals he supervised were considered to be "temporary" employees who had been referred to Mohawk by one of two hiring agencies - Strategic or Aleya (the "Hiring Agencies"). Specifically, Carpenter understood that Mohawk considered these 12 to 15 individuals (the "Temporary Employees") to be employees of the Hiring Agencies that referred them to Mohawk.

26. Carpenter issued paychecks to everyone on his Shift but the Temporary Employees who he understood were paid by the Hiring Agencies.

27. Months after Carpenter became a Shift Supervisor at Mohawk, Mohawk management informed Carpenter that HR had decided to seek to convert all of the Temporary Employees on his Shift to be Mohawk employees. Carpenter was asked to communicate with each of the 12 to 15 Temporary Employees and ask them to complete and turn into HR a written request to be hired directly by Mohawk. Carpenter was told that this conversion was to be made because the temporary workers had been on temporary status for long enough to be hired by Mohawk.

28. In November 2006, Carpenter followed up on his instruction to ask the Temporary Employees to make a direct request to Mohawk HR to be hired by Mohawk.

29. However, when he discussed this "conversion process" with the Temporary Employees, all but one of them told Carpenter that they could not get hired through that process because they did not have all of the proper documentation to legally work in the United States.

30. Carpenter was confused why Mohawk would have allowed more than ten illegal aliens to work at on his Shift and he was quite concerned. Accordingly, Carpenter decided to contact Mohawk's Human Resources ("HR") Department.

31. Generally, when Carpenter interacted with Mohawk's HR Department, he communicated by email or by phone with a woman named Becky. Upon information and belief, Becky reported to the regional head of Mohawk's HR Department — Defendant Patricia Silvers.

32. On or about November 28, 2006, Carpenter sent an email to Becky at Mohawk HR. In this email, he told her that he had concluded that about 90% of the temporary workers on his Shift did not have proper documentation to work in the United States. Carpenter expected to hear back quickly from her on what he should do about this serious problem, but Becky did not respond to his email. No one did.

33. Instead, upon information and belief, Becky showed the email to her boss, Silvers. Silvers then showed it to representatives of Mohawk's Legal

Department, including General Counsel Perillo. Upon information, Perillo immediately contacted *Williams* Lawsuit litigation defense counsel Morillo. Briggs and Higgins were also informed of the email.

34. Mohawk, Mohawk Legal, and Mohawk HR were obviously concerned about Carpenter's email and its potential relationship to the *Williams* Lawsuit. Not only did the email report illegal aliens hired under the alleged Mohawk-agency enterprise in the *Williams* Lawsuit - 90% of the 12 to 15 temporary workers on Carpenter's shift met the 10 person trigger of the INA violation directly alleged by the *Williams* Lawsuit. Revelation of Carpenter's email in the *Williams* Lawsuit could be an extremely damaging document to Mohawk in the *Williams* Lawsuit.

35. Mohawk, Mohawk Legal, and Mohawk HR realized that, if Carpenter remained employed, he would have to be identified in the impending discovery in the *Williams* Lawsuit as a Shift Supervisor over temporary workers - an obviously important list of witnesses for the *Williams* Plaintiffs to depose. They also knew that, if Carpenter did not retract his email report, Carpenter's expected testimony could be devastating evidence against Mohawk.

36. Accordingly, Mohawk, Mohawk operations management (including Mr. Briggs), Mohawk Legal (including Mr. Perillo), Mohawk HR (including Silvers), and Mohawk's defense counsel in the *Williams* Lawsuit (Morillo) (the 'Conspirators") all conspired to alter or

suppress this evidence in a blatant effort to obstruct justice. Based upon the events that followed, the elements of the conspiratorial plan became obvious. These acts were part of the ongoing enterprise of the Conspirators and others to suppress evidence in the *Williams* Lawsuit.

37. First, Mohawk and Mohawk HR (who was directly to blame for the hiring of the 10 or more illegal aliens on Carpenter's Shift before Carpenter was hired) agreed to require Carpenter to meet in a closed room with outside counsel Morillo. Upon information and belief and based upon the events that followed, Morillo was asked to confront Carpenter with his incriminating email and intimidate him into retracting the substance or at least retracting the material assertions in his email so that he would not testify to its accuracy in the *Williams* Lawsuit. Upon information and belief, it was understood that Morillo may be required to use intimidation and implied threats to prevent Carpenter from testifying in *Williams* consistently with his email and to instead testify that he was mistaken about the status of the temporary workers.

38. If Carpenter did not relent under this intimidation, upon information and belief and the subsequent events, the Conspirators planned an alternative method for deterring Carpenter from testifying about his recent discovery in the *Williams* Lawsuit. The Conspirators decided that Mohawk would in that event tell Carpenter that he was terminated from Mohawk on a bogus finding that Carpenter had committed immigration crimes by harboring illegal aliens.

39. The Conspirators determined that this termination and accusation would deter Carpenter from

testifying in three independent ways. First, if Carpenter were no longer employed, it would be easier to hide his short and otherwise unremarkable employment from the *Williams* Plaintiffs in discovery. Second, having terminated him and having falsely accused him of criminal misconduct, Carpenter would be deterred from volunteering his knowledge to the *Williams* Plaintiffs and testifying on their behalf. Third, in the worst-case scenario, the Conspirators concluded that Carpenter could be impeached by the false and defamatory allegation that he was an immigration criminal. After planning this conspiracy, the Conspirators executed upon it.

40. On or about December 3, 2006, Morillo flew to from Washington, D.C. to Atlanta and drove to Calhoun in order to interrogate Carpenter the following day.

41. Still wondering why HR had not contacted him about his email, Carpenter reported to work on the morning of December 4, 2006. Before he started his Shift, the First Shift Supervisor told Carpenter that Briggs had stated that Carpenter was not to start his Shift but was instead to report to Mohawk's Law Department immediately and that he was directed to talk to a Mohawk lawyer.

42. Carpenter obeyed this direction. He drove across town to Mohawk's corporate offices and entered the Law Department. He was directed to a conference room. In the conference room was a man and a woman. The man identified himself as Juan Morillo from the law firm of Sidley Austin in Washington, D.C. Morillo identified the woman as a woman from his office who would take notes of

his interview of Carpenter. Carpenter then sat down and underwent an interrogation - or more accurately an inquisition - from Morillo.

43. During the course of the inquisition, Morillo made numerous statements and engaged in numerous acts that were designed to (and which did in fact) intimidate and implicitly threaten Carpenter with the goal of causing him to state that he was not sure that there were any illegal aliens on his Shift or, at a minimum, state that his 90% estimate was an exaggeration. Morillo did not achieve this intended goal.

44. On the evening of December 4, 2006 or the morning of December 5, 2006, based upon information and belief and the events that occurred thereafter, Morillo met with Silvers, Perillo, Briggs, and/or Higgins (and possibly others) to discuss his interrogation of Carpenter. Based upon this meeting, it was determined that Silvers would terminate Carpenter on December 5, 2006 because Carpenter would not be deterred by the interrogation from testifying or testifying truthfully in the *Williams* Lawsuit. It was also determined that Silvers would falsely accuse Carpenter of a crime in order to further deter and intimidate him from testifying or testifying truthfully in the *Williams* Lawsuit.

45. The next day, December 5, 2006, Carpenter was contacted by phone during his shift and told he needed to report to the office of Mohawk Vice President, Jeffery Briggs. He did so and was again directed to a conference room. In the conference room were Vice President Briggs, Plant Manager Higgins, and Human Resources Head

Silvers. As they had planned, Briggs and Higgins said nothing during the meeting. Instead, Silvers spoke and acted for Mohawk and the Conspirators to complete the conspiracy.

46. Silvers stated to Carpenter, "As you know, you have talked to our outside attorney." Carpenter confirmed that he had done so. She told him that the outside attorney had talked to Mohawk's in-house attorneys about what had occurred between Morillo and Carpenter. Silvers stated that Mohawk's attorneys told her that she had to terminate his employment. Carpenter was stunned.

47. Silvers made it clear that she was carrying out the action in concert with the Legal Department and Mohawk. She stated that she was terminating Carpenter because he had committed illegal conduct - "screening" individuals on his shift by sending only those who he believed to be legally entitled to work to HR for hiring.

48. Thus, Silvers accused Carpenter of committing the crime of harboring illegal aliens on his Shift. Silvers' criminal allegation was of course pretextual and preposterous. Upon learning that some of his workers were illegal, Carpenter had emailed HR and was awaiting directions.

49. Through their use of Morillo, the Conspirators had communicated to Carpenter that they believed that, if he remained employed, he would be expected to testify in the *Williams* Lawsuit and they did not want him testifying truthfully about his email and his knowledge of illegal alien temporary workers on his Shift.

50. The Conspirators made it clear to Carpenter that they were very concerned that he was going to testify in the *Williams* Lawsuit and they wanted him to recant his email. Because Carpenter refused to do so, he was terminated.

51. Through Morillo, the Conspirators made it clear to Carpenter through their words and actions that any concern would be resolved and the inquisition would be over (and his employment would continue) if Carpenter would change his expected testimony.

52. When Carpenter refused to recant his e-mail, the Conspirators told him that he was a criminal and terminated for his alleged criminal misconduct. The message was clear: if he testified in the *Williams* Lawsuit, the Conspirators would accuse him of a crime and he may end up in jail as well as having lost his job.

53. The Conspirators clearly indicated through word, tone, and actions to Carpenter that his termination and its stated reason - alleged criminal conduct that was wholly fabricated - was designed to prevent him from volunteering to testify in the *Williams* Lawsuit and to provide a basis to injure him further should he choose to testify.

54. The bases of Carpenter's claims in this action are not simply that he was terminated for a false and pretextual reason. Instead, the actions of the Conspirators constituted an attempted and actual course of intimidation and threats to deter him from testifying and/or testifying truthfully.

55. As a part of the conspiracy, Morillo acted in a manner to convince Carpenter to falsely indicate and later testify falsely in the *Williams* Lawsuit that his email was incorrect and that he did not have knowledge of 10 or more illegal aliens working on his Shift. These actions and the actions of the following day by the Conspirators establish a concerted effort to deter Carpenter from testifying and/or testifying truthfully.

56. The deterrence of the Conspirators was accompanied by intimidation and strongly implied threats. This is especially true considering the unequal bargaining power between Carpenter and Mohawk, Carpenter and Morillo, and between Carpenter and the Conspirators that created intimidation in a situation where it might not otherwise exist.

57. Because of the Conspirators' efforts to deter by intimidation and threat Carpenter's testimony in the *Williams* Lawsuit, Carpenter was injured both in the loss of his job and in his suffering extreme emotional distress.

## *CLAIMS*

### *COUNT I*

### (Claim under 42 U.S.C. § 1985(2) – Against All Defendants)

58. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 57 of this Complaint as though set forth here in full.

59. 42 U.S.C. § 1985(2) ("§ 1985(2)") prohibits two or more persons from conspiring to "deter, by force,

intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully or to injure such party or person on account of his having so attended or testified. . . ."

60. An individual injured by a violation of § 1985(2) has a civil cause of action for damages against any or all of the individuals or entities that violated § 1985(2).

61. Mohawk (through itself and its counsel), Silvers, Briggs, Higgins, and others conspired to deter by intimidation and threat Carpenter from testifying in the *Williams* Lawsuit and, if he were to testify, from testifying freely, fully and truthfully.

62. Carpenter was injured in his person and property as a direct and proximate cause of this intentional and illegal conspiracy in violation of § 1985(2).

## *COUNT II*

## (Claim Under Georgia RICO – Against All Defendants)

63. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 62 of this Complaint as though set forth here in full.

64. Defendants actions set forth herein constituted violations of Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-4-1 *et. seq.* ("Georgia RICO").

65. No later than learning of Carpenter's email to Becky in late November 2006 or early December 2006, Mohawk (through itself and its counsel), Silvers, Briggs, Higgins and perhaps others (the "Conspirators"), formed an association-in-fact enterprise although not a legal entity which constituted "Enterprise" as defined by O.C.G.A. § 16-4-3(6).

66. The Enterprise engaged in racketeering activity as defined by O.C.G.A § 16-14-3(9)(A) in that the Conspirators through the Enterprise committed and attempted to commit or to coerce or intimidate another person to commit one or more crimes chargeable by indictment, including the following laws of Georgia: O.C.G.A. § 16-10-93, relating to influencing witnesses and O.C.G.A. § 16-10-32(b) relating to tampering with witnesses and obstructing justice.

67. O.C.G.A. § 16-10-93(a) states that it is a crime for any person who, "with intent to deter a witness from testifying freely, fully, and truthfully to any matter pending in court . . . communicates directly or indirectly, to such witness any threat of injury or damage to the person, property or employment of the witness . . ."

68. The Conspirators through the Enterprise communicated directly or indirectly to Carpenter a threat of injury or damage to his person, property or employment with the intent to deter him from testifying freely, fully and truthfully to the *Williams* Lawsuit pending in this Court.

69. O.C.G.A. § 16-10-93(b)(1) states that it is a crime for a person "knowingly to use intimidation . . . or threats

. . . to engage in misleading conduct toward another person with the intent to: (A) Influence, delay, or prevent the testimony of any person in an official proceeding; (B) Cause or induce any person to: (i) Withhold testimony or a record, document, or other object from an official proceeding. . . ."

70. The Conspirators through the Enterprise used intimidation and direct or implied threats towards Carpenter and/or engaged in misleading conduct towards Carpenter to seek to influence, delay or prevent the testimony of Carpenter in the *Williams* Lawsuit in this Court and/or to cause or induce Carpenter to withhold testimony or his email from the *Williams* Lawsuit in this Court.

71. As defined in O.C.G.A. § 16-14-3(8)(A), the Conspirators through the Enterprise engaged in at least two acts of racketeering activity in furtherance of one or more incidents, schemes or transactions that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise interrelated by distinguishing characteristics and that are not isolated incidents. Such acts of racketeering included, but are not limited to, Marillo's (on behalf of in execution of overt acts subject to an agreement by the Enterprise) attempts to intimidate, deter, and threaten Carpenter in his December 4, 2006 interrogation; Silver's (on behalf of in execution of overt acts subject to an agreement by the Enterprise) December 5, 2006 termination of Carpenter; and Silver's (on behalf of in execution of overt acts subject to an agreement by the Enterprise) December 5, 2006 accusation to Carpenter that he had committed a crime. All of these acts were in furtherance of the Enterprise's racketeering activity described above.

72. The Enterprise was formed to seek to influence testimony and evidence in the *Williams* Lawsuit. Because the *Williams* Lawsuit is so important to the economic future of Mohawk and their careers at Mohawk, the Enterprise was formed to hide and conceal evidence that could hurt Mohawk in the *Williams* Lawsuit and to intimidate, threaten any potential adverse witness with the intent to deter the witness from testifying in a manner adverse to Mohawk and/or to deter them from testifying freely and truthfully.

73. As a direct and proximate cause of Defendants' violation of Georgia RICO, Carpenter has been injured and has suffered damages.

74. Carpenter is entitled to recover from Defendants damages, treble damages, attorneys' fees and costs of investigation and litigation reasonably incurred pursuant to O.C.G.A. § 16-14-16, and other relief.

## *COUNT III*

## (Claim Of Intentional Infliction Of Emotional Distress Under Georgia Law – Against All Defendants)

75. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 74 of this Complaint as though set forth here in full.

76. The actions of Defendants against Plaintiff amounted to outrageous conduct that was designed to inflict severe emotional distress upon Plaintiff to deter him from testifying and those actions did inflict severe

emotional distress upon Plaintiff. Defendants' conduct amounted to the tort of intentional infliction of emotional distress under Georgia law that caused Carpenter to suffer direct and proximately caused injuries and damages.

## *COUNT IV*

### (Claim of Interference With Contractual Relations Under Georgia Law – Against All Individual Defendants)

77. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 76 of this Complaint as though set forth here in full.

78. Upon information and belief, neither Silvers, Briggs, nor Higgins had unconditional and absolute authority to terminate Carpenter's employment at Mohawk.

79. In seeking to cause Mohawk to terminate Carpenter's employment, Silvers, Briggs, and Higgins acted improperly and without privilege.

80. In seeking to cause Mohawk to terminate Carpenter's employment, Silvers, Briggs, and Higgins acted purposely, wrongfully, and with malice with intent to injure Carpenter.

81. In seeking to cause Mohawk to terminate Carpenter's employment, Silvers, Briggs, and Higgins induced a third party (Mohawk) to breach a contract and/or employment relationship with Carpenter and/or to fail to continue its contract and/or employment relationship with Carpenter.

82. As a result of these tortious actions by Silvers, Briggs, and Higgins, Carpenter suffered direct and proximately caused injuries and damages.

## *COUNT V*

## (Claim Of Tortious Violation Of Public Policy Under Georgia Law - Against All Defendants)

83. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 82 of this Complaint as though set forth here in full.

84. A person's effort to intimidate, threaten or deter another person from testifying or testifying truthfully or freely is a violation of Georgia criminal law and a recognized Georgia public policy. Among other damages, such actions would outrage or cause mental suffering, shame or humiliation to the ordinary person of ordinary sensibilities. Under Georgia law, anyone injured from such wrongful conduct is entitled to recover damages for such injuries from such wrongful conduct.

85. The Defendants engaged in the wrongful conduct alleged above and cause Plaintiff to suffer direct and proximately caused injuries and damages.

## *COUNT VI*

## (Claim of Invasion Of Private Right To Testify Under Georgia Law – Against All Defendants)

86. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 85 of this Complaint as though set forth here in full.

87. Every citizen of Georgia has a private right to testify and to testify truthfully in a pending action in court. Any wrongful intrusion of that right is wrongful and amounts to a trespass to that person's right to privacy in violation of Georgia law.

88. By engaging in the acts alleged herein, Defendants trespassed and intruded on Carpenter's private right to testify and to testify freely and truthfully and such tortious acts by Defendants caused Carpenter to suffer direct and proximately caused injuries and damages.

## *COUNT VII*

## (Claim For Aiding and Abetting Under Georgia Law)

89. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 88 of this Complaint as though set forth here in full.

90. Each of the Defendants has engaged in civil conspiracy to plan and commit the torts and unlawful actions alleged herein. Other than the intentional interference with contract with respect to Mohawk, each of the Defendants is jointly and severally liable for these torts as each maliciously procured an injury to be done to Plaintiffs by another and is thus a joint wrongdoer under O.C.G.A. 51-12-30. In addition, each tort committed was committed pursuant to a conspiracy between all of the Defendants and others whereby the Defendants acted in concert.

91. Carpenter suffered direct and proximately caused damages from Defendants' conspiratorial conduct and each Defendant's aiding and abetting of the tortious conduct of each other Defendant.

## *PRAYER FOR RELIEF*

WHEREFORE, Plaintiff respectfully prays:

A. That a declaratory judgment be issued declaring that the actions of Defendants against Plaintiff alleged herein violated 42 U.S.C. § 1985(2);

B. That the court permanently enjoin any future violations of 1985(2) by Defendants including those violations that are designed to deter and prevent witnesses from testifying truthfully and freely in the *Williams* Lawsuit;

C. That judgment be entered in favor of Plaintiff for an amount, equal to his back pay and benefit damages, and front pay and benefit damages together with interest at a rate of not less than 6% per annum;

D. That judgment be entered in favor of Plaintiff for compensatory damages;

E. That judgment be entered in favor of Plaintiff for treble damages and punitive damages;

F. That Plaintiff be granted his attorneys' fees, experts' fees, and the costs and expenses of this litigation;

G. That Plaintiff be awarded such other and further legal and equitable relief as may be found appropriate and as the Court may deem just or equitable; and

H. That the Court retain jurisdiction over Defendants until such time as it is satisfied that they have remedied the practices complained of and are determined to be in full compliance with the law.

Respectfully submitted,

s/ Thomas J. Munger
Thomas J. Munger
Georgia State Bar No. 529609

s/ Benjamin A. Stone
Benjamin A. Stone
Georgia State Bar No. 683850

Munger & Stone, LLP
999 Peachtree Street, NE
Suite 2850
Atlanta, Georgia 30309
Telephone: (404) 815-1884
Facsimile: (404) 815-4687
Email: *tom.munger@mungerandstone.com*
*ben.stone@mungerandstone.com*

Attorneys for Plaintiff

JS44 (Rev 5/05 NDGA)

# CIVIL COVER SHEET

4:07-CV- 049

The JS44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required except as provided by local rules of court. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket record. (SEE INSTRUCTIONS ATTACHED)

## I. (a) PLAINTIFF(S)

NORMAN CARPENTER

## DEFENDANT(S)

MOHAWK INDUSTRIES, INC;
PATRICIA SILVERS; JEFFERY BRIGGS;
SCOTT HIGGINS

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Whitfield
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Gordon
(IN U.S. PLTF. CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

## (c) ATTORNEYS (FIRM NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL ADDRESS)

MUNGER & STONE, LLP
999 PEACHTREE STREET, N.E. STE 2850
ATLANTA, GA. 30309
404-815-1884 - ben.stone@mungerandstone.com

## ATTORNEYS (IF KNOWN)

## II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

☐ 1 U.S. GOVERNMENT PLAINTIFF
☑ 3 FEDERAL QUESTION (U.S. GOVERNMENT NOT A PARTY)
☐ 2 U.S. GOVERNMENT DEFENDANT
☐ 4 DIVERSITY (INDICATE CITIZENSHIP OF PARTIES IN ITEM III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(FOR DIVERSITY CASES ONLY)

| PLF | DEF | | PLF | DEF | |
|---|---|---|---|---|---|
| ☐ 1 | ☐ 1 | CITIZEN OF THIS STATE | ☐ 4 | ☐ 4 | INCORPORATED OR PRINCIPAL PLACE OF BUSINESS IN THIS STATE |
| ☐ 2 | ☐ 2 | CITIZEN OF ANOTHER STATE | ☐ 5 | ☐ 5 | INCORPORATED AND PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE |
| ☐ 3 | ☐ 3 | CITIZEN OR SUBJECT OF A FOREIGN COUNTRY | ☐ 6 | ☐ 6 | FOREIGN NATION |

## IV. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☑ 1 ORIGINAL PROCEEDING
☐ 2 REMOVED FROM STATE COURT
☐ 3 REMANDED FROM APPELLATE COURT
☐ 4 REINSTATED OR REOPENED
☐ 5 TRANSFERRED FROM ANOTHER DISTRICT (SPECIFY DISTRICT)
☐ 6 MULTIDISTRICT LITIGATION
☐ 7 APPEAL TO DISTRICT JUDGE FROM MAGISTRATE JUDGE JUDGMENT

## V. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE - DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

(IF COMPLEX, CHECK REASON BELOW)

☐ 1. Unusually large number of parties
☐ 2. Unusually large number of claims or defenses.
☐ 3. Factual issues are exceptionally complex
☐ 4. Greater than normal volume of evidence.
☐ 5. Extended discovery period is needed
☐ 6. Problems locating or preserving evidence
☐ 7. Pending parallel investigations or actions by government
☐ 8. Multiple use of experts
☐ 9. Need for discovery outside United States boundaries
☐ 10. Existence of highly technical issues and proof

**CONTINUED ON REVERSE**

FOR OFFICE USE ONLY

RECEIPT # ______ AMOUNT $ ______ APPLYING IFP ______ MAG. JUDGE (IFP) ______

JUDGE ______ MAG. JUDGE ______ (Referral) NATURE OF SUIT ______ CAUSE OF ACTION ______

## VI. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

**CONTRACT - "0" MONTHS DISCOVERY TRACK**
☐ 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
☐ 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL. VETERANS)
☐ 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS

**CONTRACT - "4" MONTHS DISCOVERY TRACK**
☐ 110 INSURANCE
☐ 120 MARINE
☐ 130 MILLER ACT
☐ 140 NEGOTIABLE INSTRUMENT
☐ 151 MEDICARE ACT
☐ 160 STOCKHOLDERS' SUITS
☐ 190 OTHER CONTRACT
☐ 195 CONTRACT PRODUCT LIABILITY
☐ 196 FRANCHISE

**REAL PROPERTY - "4" MONTHS DISCOVERY TRACK**
☐ 210 LAND CONDEMNATION
☐ 220 FORECLOSURE
☐ 230 RENT LEASE & EJECTMENT
☐ 240 TORTS TO LAND
☐ 245 TORT PRODUCT LIABILITY
☐ 290 ALL OTHER REAL PROPERTY

**TORTS - PERSONAL INJURY - "4" MONTHS DISCOVERY TRACK**
☐ 310 AIRPLANE
☐ 315 AIRPLANE PRODUCT LIABILITY
☐ 320 ASSAULT, LIBEL & SLANDER
☐ 330 FEDERAL EMPLOYERS' LIABILITY
☐ 340 MARINE
☐ 345 MARINE PRODUCT LIABILITY
☐ 350 MOTOR VEHICLE
☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
☐ 360 OTHER PERSONAL INJURY
☐ 362 PERSONAL INJURY - MEDICAL MALPRACTICE
☐ 365 PERSONAL INJURY - PRODUCT LIABILITY
☐ 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

**TORTS - PERSONAL PROPERTY - "4" MONTHS DISCOVERY TRACK**
☐ 370 OTHER FRAUD
☐ 371 TRUTH IN LENDING
☐ 380 OTHER PERSONAL PROPERTY DAMAGE
☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY

**BANKRUPTCY - "0" MONTHS DISCOVERY TRACK**
☐ 422 APPEAL 28 USC 158
☐ 423 WITHDRAWAL 28 USC 157

**CIVIL RIGHTS - "4" MONTHS DISCOVERY TRACK**
☐ 441 VOTING
☐ 442 EMPLOYMENT
☐ 443 HOUSING/ ACCOMMODATIONS
☐ 444 WELFARE
☑ 440 OTHER CIVIL RIGHTS
☐ 445 AMERICANS with DISABILITIES - Employment
☐ 446 AMERICANS with DISABILITIES - Other

**PRISONER PETITIONS - "0" MONTHS DISCOVERY TRACK**
☐ 510 MOTIONS TO VACATE SENTENCE
☐ 530 HABEAS CORPUS
☐ 535 HABEAS CORPUS DEATH PENALTY
☐ 540 MANDAMUS & OTHER
☐ 550 CIVIL RIGHTS (Filed Pro se)
☐ 555 PRISON CONDITION(S) (Filed Pro se)

**PRISONER PETITIONS - "4" MONTHS DISCOVERY TRACK**
☐ 550 CIVIL RIGHTS (Filed by Counsel)
☐ 555 PRISON CONDITION(S) (Filed by Counsel)

**FORFEITURE/PENALTY - "4" MONTHS DISCOVERY TRACK**
☐ 610 AGRICULTURE
☐ 620 FOOD & DRUG
☐ 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881
☐ 630 LIQUOR LAWS
☐ 640 R.R. & TRUCK
☐ 650 AIRLINE REGS.
☐ 660 OCCUPATIONAL SAFETY/HEALTH
☐ 690 OTHER

**LABOR - "4" MONTHS DISCOVERY TRACK**
☐ 710 FAIR LABOR STANDARDS ACT
☐ 720 LABOR/MGMT. RELATIONS
☐ 730 LABOR/MGMT. REPORTING & DISCLOSURE ACT
☐ 740 RAILWAY LABOR ACT
☐ 790 OTHER LABOR LITIGATION
☐ 791 EMPL. RET. INC. SECURITY ACT

**PROPERTY RIGHTS - "4" MONTHS DISCOVERY TRACK**
☐ 820 COPYRIGHTS
☐ 840 TRADEMARK

**PROPERTY RIGHTS - "8" MONTHS DISCOVERY TRACK**
☐ 830 PATENT

**SOCIAL SECURITY - "0" MONTHS DISCOVERY TRACK**
☐ 861 HIA (1395ff)
☐ 862 BLACK LUNG (923)
☐ 863 DIWC (405(g))
☐ 863 DIWW (405(g))
☐ 864 SSID TITLE XVI
☐ 865 RSI (405(g))

**FEDERAL TAX SUITS - "4" MONTHS DISCOVERY TRACK**
☐ 870 TAXES (U.S. Plaintiff or DEFENDANT)
☐ 871 IRS - THIRD PARTY 26 USC 7609

**OTHER STATUTES - "4" MONTHS DISCOVERY TRACK**
☐ 400 STATE REAPPORTIONMENT
☐ 430 BANKS AND BANKING
☐ 450 COMMERCE/ICC RATES/ETC.
☐ 460 DEPORTATION
☐ 470 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
☐ 480 CONSUMER CREDIT
☐ 490 CABLE/SATELLITE TV
☐ 810 SELECTIVE SERVICE
☐ 875 CUSTOMER CHALLENGE 12 USC 3410
☐ 891 AGRICULTURAL ACTS
☐ 892 ECONOMIC STABILIZATION ACT
☐ 893 ENVIRONMENTAL MATTERS
☐ 894 ENERGY ALLOCATION ACT
☐ 895 FREEDOM OF INFORMATION ACT
☐ 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE
☐ 950 CONSTITUTIONALITY OF STATE STATUTES
☐ 890 OTHER STATUTORY ACTIONS

**OTHER STATUTES - "8" MONTHS DISCOVERY TRACK**
☐ 410 ANTITRUST
☐ 850 SECURITIES / COMMODITIES / EXCHANGE

**OTHER STATUTES - "0" MONTHS DISCOVERY TRACK**
☐ ARBITRATION (CONFIRM/VACATE/ORDER/MODIFY)

**(Note: Please mark underlying Nature of Suit as well)**

*** PLEASE NOTE DISCOVERY TRACK FOR EACH CASE TYPE. SEE LOCAL RULE 26.3**

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## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF **CLASS ACTION** UNDER F.R.Civ.P. 23 DEMAND $____________ ____________

JURY DEMAND ☑ YES ☐ NO (CHECK YES **ONLY** IF DEMANDED IN COMPLAINT)

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## VIII. RELATED/REFILED CASE(S) IF ANY

JUDGE Murphy DOCKET NO. 4:04-cv-0003-HLM

**CIVIL CASES ARE DEEMED RELATED IF THE PENDING CASE INVOLVES:** (CHECK APPROPRIATE BOX)

☐ 1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
☑ 2. SAME ISSUE OF FACT OR ARISES OUT OF THE SAME EVENT OR TRANSACTION INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
☐ 4. APPEALS ARISING OUT OF THE SAME BANKRUPTCY CASE AND ANY CASE RELATED THERETO WHICH HAVE BEEN DECIDED BY THE SAME BANKRUPTCY JUDGE.
☐ 5. REPETITIVE CASES FILED BY PRO SE LITIGANTS.
☐ 6. COMPANION OR RELATED CASE TO CASE(S) BEING SIMULTANEOUSLY FILED (INCLUDE ABBREVIATED STYLE OF OTHER CASE(S)):

☐ 7. EITHER SAME OR ALL OF THE PARTIES AND ISSUES IN THIS CASE WERE PREVIOUSLY INVOLVED IN CASE NO. ____________, WHICH WAS DISMISSED. This case ☐ IS ☐ IS NOT (check one box) SUBSTANTIALLY THE SAME CASE.

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SIGNATURE OF ATTORNEY OF RECORD DATE

## *Appendix C*

[illegible] DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION
[illegible] ROME, [illegible]
HUNGER & STONE

[illegible]

CHECK [illegible]
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HUNGER & STONE
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TOTAL [illegible]
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CHANGE [illegible]

BEST AVAILABLE COPY

# APPENDIX D — DEFENDANT MOHAWK INDUSTRIES, INC.'S MOTION TO DISMISS, DATED APRIL 17, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC., PATRICIA SILVERS, JEFFERY BRIGGS, SCOTT HIGGINS,

Defendant.

## DEFENDANT MOHAWK INDUSTRIES, INC., MOTION TO DISMISS

Defendant Mohawk Industries, Inc. ("Mohawk") respectfully moves this Court to dismiss with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6), the following four counts of Plaintiff's Complaint ("Complaint") for failure to state a claim upon which relief can be granted: Count Two (Violation of Georgia RICO); Count Five (Tortious Violation of Public Policy); Count Six (Invasion of the Private Right to Testify); and Count Seven (Aiding and Abetting).

In support of this motion, Mohawk submits the accompanying Brief in Support of the Motion to Dismiss.

Respectfully submitted, this 17th day of April, 2007.

*/s/ Leigh R. Rhoads*
RANDALL L. ALLEN
Georgia State Bar No. 011436
DANIEL F. DIFFLEY
Georgia State Bar No. 221703
LEIGH R. RHOADS
Georgia State Bar No. 142488

*Attorneys for*
*Mohawk Industries, Inc.*

ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
(404) 881-7777 (Facsimile)

# APPENDIX E — PLAINTIFF'S FIRST AMENDED COMPLAINT, DATED MAY 1, 2007

## UNITED STATES DISTRICT COURT
## FOR THE NORTHERN DISTRICT OF GEORGIA
## ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-0049-HLM

NORMAN CARPENTER,

Plaintiff

vs.

MOHAWK INDUSTRIES, INC.; PATRICIA SILVER;
JEFFERY BRIGGS; SCOTT HIGGINS;

Defendants.

## ACTION UNDER
## 42 U.S.C. § 1985(2)
## AND CLAIMS UNDER GEORGIA LAW

## JURY TRIAL DEMANDED

## PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff Norman Carpenter ("Plaintiff" or "Carpenter") files in this action his First Amended Complaint against Defendants Mohawk Industries, Inc. ("Mohawk") and Mohawk executives/managers Patricia Silver, Jeffery Briggs, and Scott Higgins. Plaintiff shows the Court as follows:

## *OVERVIEW*

1. Plaintiff, a former Mohawk Shift Supervisor, was injured, including by being terminated, through a conspiracy between Mohawk, Silver, Briggs, Higgins, and others to deter and prevent him from testifying and/or from testifying truthfully and freely in a major class action lawsuit against Mohawk pending in this Court. Defendants' conduct violated 42 U.S.C. § 1985(2) and was tortious under Georgia law.

## *JURISDICTION AND VENUE*

2. This is a civil action over which original, federal question jurisdiction is vested in this Court by virtue of 28 U.S.C. §§ 1331, § 1343(a), and §1367.

3. Venue is appropriate in this Court under 28 U.S.C. § 1391 as this action is brought in a judicial district in which the defendants reside or may be found at the time the action is commenced. Further, Plaintiff resides and was employed by Defendant Mohawk, in a county within the Northern District of Georgia, Rome Division.

## *THE PARTIES*

4. Plaintiff Norman Carpenter resides at 1700 Willow Oak Lane, No. 27, Dalton, Georgia 30721. He was employed as a Shift Supervisor for Defendant Mohawk from June 1, 2006 until December 5, 2006.

5. Defendant Mohawk is the second largest carpet and rug manufacturer in the United States. Mohawk's net sales in 2005 exceeded $6.6 billion. Mohawk employs more than 37,000 employees, most of who are employed in Northwest Georgia. Mohawk owns or leases a number of facilities in Georgia.

6. Mohawk is incorporated in Delaware and its principal place of business is in Calhoun, Georgia.

7. Defendant Patricia Silver is employed by Mohawk as an executive in Mohawk's Human Resources Department and is the highest-ranking Human Resources Executive in Mohawk's Home Division in Calhoun, Georgia.

8. Defendant Scott Higgins is a Plant Manager employed by Mohawk who was the direct supervisor of Carpenter at the time of the termination of Carpenter's employment with Mohawk on December 5, 2006.

9. Defendant Jeffery Briggs is a Vice President employed by Mohawk who was the direct supervisor of Defendant Higgins at the time of the termination of Carpenter's employment with Mohawk on December 5, 2006.

## *FACTUAL ALLEGATIONS*

### A. *The Mohawk RICO/IRCA Class Action*

10. On January 6, 2004, four formerly hourly Mohawk employees and one current Mohawk hourly employee ("the *Williams* Plaintiffs") filed a class action lawsuit against Mohawk in this Court, *Williams v. Mohawk Industries, Inc.*, United States District Court for the Northern District of Georgia, Rome Division, Civil Action File No. 4:04-CV-0003-HLM ("the *Williams* Lawsuit").

11. In the *Williams* Lawsuit, the *Williams* Plaintiffs allege that Mohawk has violated the federal RICO and the Georgia Racketeer Influenced and Corrupt Organizations Act, § 16-14-4(a) ("Georgia RICO") by engaging in an illegal racketeering enterprise with a group of independent hiring and/or recruiting firms ("the Enterprise") to conspire to violate various provisions of the Immigration and Nationality Act, 8 U.S.C.A. § 1324 ("INA").

12. The *Williams* Plaintiffs allege that the Mohawk-hiring agency Enterprise has conspired to violate INA provisions that make it a federal crime to (1) "knowingly hire for employment at least 10 individuals with actual knowledge that the individuals are aliens" during a 12 months period; (2) "conceal, harbor, or shield from detection or attempt to conceal, harbor or shield from detection" aliens who have illegally entered the United States; and (3) "encourage or induce an alien" to enter

the United States knowing or in reckless disregard to the fact that such entry is or will be a violation of the law. 8 U.S.C.A. § 1324(a).

13. The *Williams* Plaintiffs further allege that Mohawk arranges with the hiring agencies to have the hiring agencies refer to them, for hire, illegal aliens to work at Mohawk facilities. They allege that a part of the racketeering enterprise is a conspiracy to engage in a cover up to hide these actions, including by the destruction of documents and the concealment of evidence that would reveal the Enterprise and its illegal actions.

14. The *Williams* Plaintiffs allege that Mohawk is motivated to engage in this illegal enterprise by the fact that it allows Mohawk to flood the available labor pool with illegal aliens and thereby provide suppressed wages and benefits to its employees, including its employees who are legally entitled to work in the United States. The *Williams* Plaintiffs allege that they are directly injured by this illegal enterprise by the effect that it depresses their wages at Mohawk.

15. If the *Williams* Class is certified under Fed. R. Civ. P. 23, Mohawk knows it is at least facing staggering potential financial liability to the class members. For this reason, the *Williams* Lawsuit has become the biggest concern and source of attention of the management of Mohawk.

16. Highlighting the central importance of the *Williams* Lawsuit to the economic health of Mohawk, in Mohawk's November 3, 2006 Form 10-Q filed with the Securities and Exchange Commission, Mohawk included a lengthy paragraph about the *Williams* Lawsuit in its Notes To Condensed Consolidated Financial Statements. Moreover, in the Legal Proceedings section of Mohawk's November 3, 2006 Form 10-Q, it discusses only one lawsuit it is facing and it discusses it at length - the *Williams* Lawsuit.

17. To defend the landmark *Williams* Lawsuit, Mohawk retained Sidley Austin. Mohawk retained as lead litigation counsel from Sidley Austin Juan P. Morillo, Esq.

18. Mr. Morillo is not licensed to practice law in Georgia but has been admitted *pro hac vice* to represent Mohawk in Georgia solely for purposes of representing Mohawk in the *Williams* Lawsuit.

19. After retaining Mr. Morillo, on February 9, 2004, Mohawk filed a motion to dismiss the *Williams* Plaintiffs' claims under federal RICO and Georgia RICO. On April 12, 2004, this Court denied Mohawk's motion to dismiss those claims. After substantial appeals, this Court's denial of Mohawk's Motion to Dismiss was affirmed and the discovery period is now open in the *Williams* case.

20. Since October 2005, Mohawk has been poised for the onset of discovery the most important and threatening lawsuit in its corporate history.

### B. *The Events Relating To Plaintiff Carpenter*

21. On June 1, 2006, Mohawk hired Plaintiff Norman Carpenter ("Carpenter") as a Shift Supervisor at one of its Calhoun facilities referred to as the Union Grove Road Facility. During his employment with Mohawk, Carpenter reported to the Plant Manager. During his tenure, the Plant Manager was Kevin Palmer followed by Defendant Scott Higgins. The Plant Manager, in turn, reported to Vice President and Defendant Jeff Briggs.

22. Carpenter was an outstanding supervisor and he increased productivity and efficiency on his shift. During his employment with Mohawk, he had little interaction with Mohawk's corporate offices. He was instead focused on managing his team on his shift.

23. As a Shift Supervisor, Carpenter supervised approximately 125 hourly Mohawk employees. The hiring of the individuals that Carpenter supervised was handled entirely by Mohawk's Human Resources Department and Carpenter had no role in the recruitment, screening or hiring of anyone working at Mohawk. Indeed, almost all of these employees were hired before Carpenter became employed at Mohawk.

24. At the time he was hired, and for the vast majority of the time that he was employed at Mohawk, Carpenter believed that all of the hourly employees he supervised were legally entitled to work in the United States.

25. During his employment, Carpenter understood that all but approximately 12 to 15 of the individuals working for him on his shift were directly employed by Mohawk. He understood that the other 12 to 15 of the individuals he supervised were considered to be "temporary" employees who had been referred to Mohawk by one of two hiring agencies - Strategic or Aleya (the "Hiring Agencies"). Specifically, Carpenter understood that Mohawk considered these 12 to 15 individuals (the "Temporary Employees") to be employees of the Hiring Agencies that referred them to Mohawk.

26. Carpenter issued paychecks to everyone on his Shift but the Temporary Employees who he understood were paid by the Hiring Agencies.

27. Months after Carpenter became a Shift Supervisor at Mohawk, Mohawk management informed Carpenter that HR had decided to seek to convert all of the Temporary Employees on his Shift to be Mohawk employees. Carpenter was asked to communicate with each of the 12 to 15 Temporary Employees and ask them to complete and turn into HR a written request to be hired directly by Mohawk. Carpenter was told that this conversion was to be made because the temporary workers had been on temporary status for long enough to be hired by Mohawk.

28. In November 2006, Carpenter followed up on his instruction to ask the Temporary Employees to make a direct request to Mohawk HR to be hired by Mohawk.

29. However, when he discussed this "conversion process" with the Temporary Employees, all but one of them told Carpenter that they could not get hired through that process because they did not have all of the proper documentation to legally work in the United States. In some of these conversations, Carpenter used one of his hourly employees, Christian Martinez ("Martinez", as a translator as Martinez speaks both English and Spanish.

30. Carpenter was confused why Mohawk would have allowed more than ten illegal aliens to work at on his Shift and he was quite concerned. Accordingly, Carpenter decided to contact Mohawk's Human Resources ("HR") Department.

31. Generally, when Carpenter interacted with Mohawk's HR Department, he communicated by email or by phone with Senior Employment Coordinator Becky Hale ("Hale"). Upon information and belief, Becky reported to the regional head of Mohawk's HR Department — Defendant Patricia Silver.

32. On November 28, 2006, Carpenter sent an email to Hale at Mohawk HR. In this email, he stated in toto: "Becky, 90% of the people that come through the temp do not have good papers thats (sic) why they come to us that way I can tell you that most of the people working here today here through a temp do not have one of the two things either a GA I.d. or good papers through the I.N.S. Thanks, Norman." Carpenter expected to hear back quickly from Hale on what he should do about this

serious problem, but Hale did not respond to his email. No one did.

33. Instead, Hale sent out two emails to other HR executives about Carpenter's email. First, Hale wrote to HR manager Kirk Prather stating in italics, "*Would you like to advise Norman?*" Second, Hale sent an email to Silver stating that she would call Silver that afternoon "to discuss before I speak with Norman."

34. The nature of the "advice" Mohawk sought to give Carpenter about his email and the nature of Hale's conversation with Silver about Carpenter's email is apparent from both previous and subsequent events.

35. Unbeknownst to Carpenter at the time, Hale has knowingly hired illegal aliens at Mohawk through the temporary services - exactly as the *Williams* plaintiffs alleged. Again unbeknownst to Carpenter at the time, Hale had previously told Martinez that she was aware that Mohawk had hired illegal aliens and that, if such illegal aliens came to Mohawk HR with a Social Security Number and a false identification, Hale could and would hire them and Mohawk would employ them.

36. Thus, in that context it is clear that what Hale wanted to "advise" Carpenter about was that he had created damaging evidence and testimony in *Williams* and that he must retract it or be punished. After reading Carpenter's email, upon information and belief, Silver then showed it to representatives of Mohawk's Legal Department, including General Counsel Perillo. Upon

information, Perillo immediately contacted *Williams* Lawsuit litigation defense counsel Morillo. Briggs and Higgins were also informed of the email.

37. Mohawk, Mohawk Legal, and Mohawk HR were obviously concerned about Carpenter's email and its potential relationship to the *Williams* Lawsuit. Not only did the email report illegal aliens hired under the alleged Mohawk-agency enterprise in the *Williams* Lawsuit - 90% of the 12 to 15 temporary workers on Carpenter's shift met the 10 person trigger of the INA violation directly alleged by the *Williams* Lawsuit. Revelation of Carpenter's email in the *Williams* Lawsuit could be an extremely damaging document to Mohawk in the *Williams* Lawsuit.

38. Mohawk, Mohawk Legal, and Mohawk HR realized that, if Carpenter remained employed, he would have to be identified in the impending discovery in the *Williams* Lawsuit as a Shift Supervisor over temporary workers - an obviously important list of witnesses for the *Williams* Plaintiffs to depose. They also knew that, if Carpenter did not retract his email report, Carpenter's expected testimony could be devastating evidence against Mohawk.

39. Accordingly, Mohawk, Mohawk operations management (including Briggs), Mohawk Legal (including Perillo), Mohawk HR (including Silver), and Mohawk's defense counsel in the *Williams* Lawsuit (Morillo) (the "Conspirators") all conspired to alter or suppress this evidence in a blatant effort to obstruct

justice. Based upon the events that followed, the elements of the conspiratorial plan became obvious. These acts were part of the ongoing enterprise of the Conspirators and others to suppress evidence in the *Williams* Lawsuit.

40. First, Mohawk and Mohawk HR (who was directly to blame for the hiring of the 10 or more illegal aliens on Carpenter's Shift before Carpenter was hired) agreed to require Carpenter to meet in a closed room with outside counsel Morillo. Upon information and belief and based upon the events that followed, Morillo was asked to confront Carpenter with his incriminating email and intimidate him into retracting the substance or at least retracting the material assertions in his email so that he would not testify to its accuracy in the *Williams* Lawsuit. Upon information and belief, it was understood that Morillo may be required to use intimidation and implied threats to prevent Carpenter from testifying in *Williams* consistently with his email and to instead testify that he was mistaken about the status of the temporary workers.

41. If Carpenter did not relent under this intimidation, upon information and belief and the subsequent events, the Conspirators planned an alternative method for deterring Carpenter from testifying about his recent discovery in the *Williams* Lawsuit. The Conspirators decided that Mohawk would in that event tell Carpenter that he was terminated from Mohawk on a bogus finding that Carpenter had committed immigration crimes by harboring illegal aliens.

42. The Conspirators determined that this termination and accusation would deter Carpenter from testifying in three independent ways. First, if Carpenter were no longer employed, it would be easier to hide his short and otherwise unremarkable employment from the *Williams* Plaintiffs in discovery. Second, having terminated him and having falsely accused him of criminal misconduct, Carpenter would be deterred from volunteering his knowledge to the *Williams* Plaintiffs and testifying on their behalf. Third, in the worst-case scenario, the Conspirators concluded that Carpenter could be impeached by the false and defamatory allegation that he was an immigration criminal. After planning this conspiracy, the Conspirators executed upon it.

43. On or about December 3, 2006, Morillo flew to from Washington, D.C. to Atlanta and drove to Calhoun in order to interrogate Carpenter the following day.

44. Still wondering why HR had not contacted him about his email, Carpenter reported to work on the morning of December 4, 2006. Before he started his Shift, the First Shift Supervisor told Carpenter that Briggs had stated that Carpenter was not to start his Shift but was instead to report to Mohawk's Law Department immediately and that he was directed to talk to a Mohawk lawyer.

45. Carpenter obeyed this direction. He drove across town to Mohawk's corporate offices and entered the Law Department. He was directed to a conference

room. In the conference room was a man and a woman. The man identified himself as Juan Morillo from the law firm of Sidley Austin in Washington, D.C. Morillo identified the woman as a woman from his office who would take notes of his interview of Carpenter. Carpenter then sat down and underwent an interrogation - or more accurately an inquisition - from Morillo.

46. During the course of the inquisition, Morillo made numerous statements and engaged in numerous acts that were designed to (and which did in fact) intimidate and implicitly threaten Carpenter with the goal of causing him to state that he was not sure that there were any illegal aliens on his Shift or, at a minimum, state that his 90% estimate was an exaggeration. Morillo did not achieve this intended goal.

47. On the evening of December 4, 2006 or the morning of December 5, 2006, based upon information and belief and the events that occurred thereafter, Morillo met with Silver, Perillo, Briggs, and/or Higgins (and possibly others) to discuss his interrogation of Carpenter. Based upon this meeting, it was determined that Silvers would terminate Carpenter on December 5, 2006 because Carpenter would not be deterred by the interrogation from testifying or testifying truthfully in the *Williams* Lawsuit. It was also determined that Silvers would falsely accuse Carpenter of a crime in order to further deter and intimidate him from testifying or testifying truthfully in the *Williams* Lawsuit.

48. The next day, December 5, 2006, Carpenter was contacted by phone during his shift and told he needed to report to the office of Mohawk Vice President, Jeffery Briggs. He did so and was again directed to a conference room. In the conference room were Vice President Briggs, Plant Manager Higgins, and Human Resources Head Silver. As they had planned, Briggs and Higgins said nothing during the meeting. Instead, Silver spoke and acted for Mohawk and the Conspirators to complete the conspiracy.

49. Silver stated to Carpenter, "As you know, you have talked to our outside attorney." Carpenter confirmed that he had done so. She told him that the outside attorney had talked to Mohawk's in-house attorneys about what had occurred between Morillo and Carpenter. Silver stated that Mohawk's attorneys told her that she had to terminate his employment. Carpenter was stunned.

50. Silver made it clear that she was carrying out the action in concert with the Legal Department and Mohawk. She stated that she was terminating Carpenter because he had committed illegal conduct - "screening" individuals on his shift by sending only those who he believed to be legally entitled to work to HR for hiring.

51. Thus, Silver accused Carpenter of committing the crime of harboring illegal aliens on his shift. Silver's criminal allegation was of course pretextual and preposterous. Upon learning that some of his workers were illegal, Carpenter had emailed HR and was awaiting directions.

52. Through their use of Morillo, the Conspirators had communicated to Carpenter that they believed that, if he remained employed, he would be expected to testify in the *Williams* Lawsuit and they did not want him testifying truthfully about his email and his knowledge of illegal alien temporary workers on his Shift.

53. The Conspirators made it clear to Carpenter that they were very concerned that he was going to testify in the *Williams* Lawsuit and they wanted him to recant his email. Because Carpenter refused to do so, he was terminated.

54. Through Morillo, the Conspirators made it clear to Carpenter through their words and actions that any concern would be resolved and the inquisition would be over (and his employment would continue) if Carpenter would change his expected testimony.

55. When Carpenter refused to recant his e-mail, the Conspirators told him that he was a criminal and terminated for his alleged criminal misconduct. The message was clear: if he testified in the *Williams* Lawsuit, the Conspirators would accuse him of a crime and he may end up in jail as well as having lost his job.

56. The Conspirators clearly indicated through word, tone, and actions to Carpenter that his termination and its stated reason - alleged criminal conduct that was wholly fabricated - was designed to prevent him from volunteering to testify in the *Williams* Lawsuit and to provide a basis to injure him further should he choose to testify.

57. The bases of Carpenter's claims in this action are not simply that he was terminated for a false and pretextual reason. Instead, the actions of the Conspirators constituted an attempted and actual course of intimidation and threats to deter him from testifying and/or testifying truthfully.

58. As a part of the conspiracy, Morillo acted in a manner to convince Carpenter to falsely indicate and later testify falsely in the *Williams* Lawsuit that his email was incorrect and that he did not have knowledge of 10 or more illegal aliens working on his Shift. These actions and the actions of the following day by the Conspirators establish a concerted effort to deter Carpenter from testifying and/or testifying truthfully.

59. The deterrence of the Conspirators was accompanied by intimidation and strongly implied threats. This is especially true considering the unequal bargaining power between Carpenter and Mohawk, Carpenter and Morillo, and between Carpenter and the Conspirators that created intimidation in a situation where it might not otherwise exist.

60. Because of the Conspirators' efforts to deter by intimidation and threat Carpenter's testimony in the *Williams* Lawsuit, Carpenter was injured both in the loss of his job and in his suffering extreme emotional distress.

61. Morillo also interrogated Martinez. The Conspirators learned that Martinez was also aware of

the fact that Hale and Mohawk had knowingly hired illegal aliens.

62. Unbeknownst to Carpenter at the time, on or about December 6, 2007, Silver, Hale and HR manager Kirk Prather (who also read the Carpenter email to Hale) confronted Martinez and told her to come into a conference room. Silver told Martinez that she could not seek information about the work status of Mohawk's employees and that was HR's job. Of course Martinez knew from Hale that it was actually "HR's job" to facilitate the knowing hiring of illegal aliens at Mohawk. Silver told Martinez that, if she did it again, "it could cost you your job." With these statements and threats the Conspirators again sought to obstruct justice and deter Martinez from testifying or testifying truthfully in Williams. Indeed, Martinez is a putative class member in *Williams.* Thus, Mohawk at least indirectly told her she would be fired if she participated in *Williams* in any fashion.

63. After Carpenter filed his original Complaint in this action, the lawsuit was reported in a local newspaper. A co-worker showed Martinez a copy of the article at work. A member of Mohawk supervision saw Martinez and the co-worker with the article about this lawsuit and told them to put the article away. He also told them that, if they were talking about this lawsuit, they could be fired. This event amounted to still another effort to obstruct justice and deter testimony in both *Williams* and this action.

64. In addition, since Carpenter filed this lawsuit, Mohawk supervisors and managers have been watching Martinez - including when she goes on break or goes to make a telephone call. Mohawk is again attempting to intimidate Martinez and insure that she does not communicate with employees about Williams, this lawsuit, or to testify in either.

## *CLAIMS*

## *COUNT I*

### (Claim under 42 U.S.C. § 1985(2) - Against All Defendants)

65. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 64 of this Complaint as though set forth here in full.

66. 42 U.S.C. § 1985(2) ("§ 1985(2)") prohibits two or more persons from conspiring to "deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully or to injure such party or person on account of his having so attended or testified. . . ."

67. An individual injured by a violation of § 1985(2) has a civil cause of action for damages against any or all of the individuals or entities that violated § 1985(2).

68. Mohawk (through itself and its counsel), Silvers, Briggs, Higgins, and others conspired to deter by intimidation and threat Carpenter from testifying in the *Williams* Lawsuit and, if he were to testify, from testifying freely, fully and truthfully.

69. Carpenter was injured in his person and property as a direct and proximate cause of this intentional and illegal conspiracy in violation of § 1985(2).

## *COUNT II*

### (Claim Under Georgia RICO - Against All Defendants)

70. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 69 of this Complaint as though set forth here in full.

71. Defendants' actions set forth herein constituted violations of Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-4-1 *et. seq.* ("Georgia RICO"). Specifically, Defendants' actions violated each provision in O.C.G.A. § 16-14-4 — O.C.G.A. § 16-14-4(a), § 16-14-4(b), and § 16-14-4(c).

72. In violation of O.C.G.A. § 16-14-4(a), Defendants, through a pattern of racketeering activity and proceeds derived therefrom, acquired and maintained directly and indirectly, an interest in and control of an enterprise, and property, including money.

73. In violation of O.C.G.A. § 16-14-4(b), Defendants Silver, Briggs, and Higgins (along with the other Conspirators) also were employed by and associated with an enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

74. In violation of O.C.G.A. § 16-14-4(c), Defendants also conspired and endeavored to violate the provisions of O.C.G.A. § 16-14-4(a) and O.C.G.A. § 16-14-4(b).

75. No later than learning of Carpenter's email to Hale in late November 2006 or early December 2006, Mohawk (through itself and its counsel), Silver, Briggs, Higgins, Hale, Morillo and others (the "Conspirators"), formed an association-in-fact enterprise although not a legal entity which constituted "Enterprise" as defined by O.C.G.A. § 16-4-3(6).

76. The Enterprise engaged in racketeering activity as defined by O.C.G.A. § 16-14-3(9)(A) in that the Conspirators through the Enterprise committed and attempted to commit or to coerce or intimidate another person to commit one or more crimes chargeable by indictment, including O.C.G.A. § 16-10-93(a), 18 U.S.C. 1512(b)(1), 18 U.S.C. 1512(b)(2)(A), and 18 U.S.C. 1512(d), relating to unlawful influencing, tampering with, and harassing of potential and actual witnesses.

77. O.C.G.A. § 16-10-93(a) states that it is a crime for any person who, "with intent to deter a witness from testifying freely, fully, and truthfully to any matter

pending in court . . . communicates directly or indirectly, to such witness any threat of injury or damage to the person, property or employment of the witness . . ."

78. Defendants' Enterprise engaged in racketeering activity with the intent to deter Carpenter (and by example to deter others) from testifying freely, fully, and truthfully to his knowledge of Mohawk's hiring of illegal aliens and his email to Hale in *Williams* by communicating directly or indirectly threats of injury or damages to his employment and liberty.

79. Defendants' Enterprise also engaged in racketeering activity with the intent to deter Martinez (and by example to deter others) from testifying freely, fully, and truthfully to her knowledge of Mohawk's knowing hiring of illegal aliens and facts relevant to Carpenter in *Williams* and/or in *Carpenter* by communicating directly or indirectly threats of injury or damages to her employment.

80. 18 U.S.C. 1512(b) states in pertinent part that it is a crime when one "knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to - (1) influence, delay or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to — (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding . . ."

81. Defendants' Enterprise also engaged in racketeering activity to knowingly use intimidation and threats to improperly seek to persuade, influence, and induce Carpenter from giving testimony and evidence in *Williams* and to withhold his email to Hale in *Williams.* Defendants also engaged in "misleading conduct" for these purposes by, amongst other things, (a) using Morillo as a ruse to purport to investigate the hiring of illegal aliens when his sole purpose was to intimidate Carpenter from testifying about his knowledge; and (b) utilizing an obvious pretext that Carpenter was committing felonious conduct in order to intimidate him into avoiding testimony in *Williams* at all costs for fear Mohawk would file criminal charges against him if he did so.

82. Defendants' Enterprise also engaged in racketeering activity to knowingly use intimidation, and threats to improperly seek to persuade, influence, and induce Martinez from giving testimony and evidence in *Williams* and *Carpenter.*

83. 18 U.S.C. 1512(d) states in pertinent part that it is a crime when one "intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from -(1) attending or testifying in an official proceeding . . ."

84. Defendants' Enterprise also engaged in racketeering activity to intentionally harass Carpenter and thereby hinder, delay, prevent and dissuade him from testifying in *Williams.*

85. Defendants' Enterprise also engaged in racketeering activity to intentionally harass Martinez and thereby hinder, delay, prevent and dissuade her from testifying in Williams and *Carpenter.*

86. As defined in O.C.G.A. § 16-14-3(8)(A), the Conspirators through the Enterprise engaged in at least two acts of racketeering activity in furtherance of one or more incidents, schemes or transactions that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise interrelated by distinguishing characteristics and that are not isolated incidents. Such acts of racketeering included, but are not limited to, Morillo's (on behalf of in execution of overt acts subject to an agreement by the Enterprise) attempts to intimidate, deter, and threaten Carpenter in his December 4, 2006 interrogation; Silver's (on behalf of in execution of overt acts subject to an agreement by the Enterprise) attempts to intimidate, deter, and threaten Carpenter at the December 5, 2006 meeting, including, but not limited to her knowing false accusation that he was he had committed crimes and her termination of his employment for the purposes of intimidating him from testifying; Silver's response to the knowledge Martinez knew about Mohawk's knowing hiring of illegal aliens from Hale and knowledge that Martinez has learned and communicated about her knowledge by threatening Martinez's employment to deter her from testifying in Williams; Mohawk's threat to Martinez that she could lose her job if she discusses *Carpenter* to deter her from providing testimony in *Carpenter* and *Williams;* Mohawk's harassment of and

intimidation of Martinez through surveillance and invasion of her privacy. All of these acts were in furtherance of the Enterprise's racketeering activity described above.

87. The Enterprise was formed to seek to influence testimony and evidence in the *Williams* Lawsuit - and, after it was filed, this related lawsuit. Because the *Williams* Lawsuit is so important to the economic future of Mohawk and their careers at Mohawk, the Enterprise was formed to hide and conceal evidence that could hurt Mohawk in the *Williams* Lawsuit and to intimidate and threaten any potential adverse witness with the intent to deter the witness from testifying in a manner adverse to Mohawk and/or to deter them from testifying freely and truthfully.

88. As a direct and proximate cause of Defendants' violation of Georgia RICO, Carpenter has been injured and has suffered damages.

89. Carpenter is entitled to recover from Defendants damages, treble damages, attorneys' fees and costs of investigation and litigation reasonably incurred pursuant to O.C.G.A. § 16-14-6, and other relief.

### *COUNT III*

### (Claim Of Intentional Infliction Of Emotional Distress Under Georgia Law - Against All Defendants)

90. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 89 of this Complaint as though set forth here in full.

91. The actions of Defendants against Plaintiff amounted to outrageous conduct that was designed to inflict severe emotional distress upon Plaintiff to deter him from testifying and those actions did inflict severe emotional distress upon Plaintiff. Defendants' conduct amounted to the tort of intentional infliction of emotional distress under Georgia law that caused Carpenter to suffer direct and proximately caused injuries and damages.

### *COUNT IV*

### (Claim of Interference With Contractual Relations Under Georgia Law - Against All Individual Defendants)

92. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 91 of this Complaint as though set forth here in full.

93. Upon information and belief, neither Silver, Briggs, nor Higgins had unconditional and absolute

authority to terminate Carpenter's employment at Mohawk.

94. In seeking to cause Mohawk to terminate Carpenter's employment, Silver, Briggs, and Higgins acted improperly and without privilege.

95. In seeking to cause Mohawk to terminate Carpenter's employment, Silver, Briggs, and Higgins acted purposely, wrongfully, and with malice with intent to injure Carpenter.

96. In seeking to cause Mohawk to terminate Carpenter's employment, Silver, Briggs, and Higgins induced a third party (Mohawk) to breach a contract and/or employment relationship with Carpenter and/or to fail to continue its contract and/or employment relationship with Carpenter.

97. As a result of these tortious actions by Silver, Briggs, and Higgins, Carpenter suffered direct and proximately caused injuries and damages.

## *COUNT V*

## (Claim Of Tortious Violation Of Public Policy Under Georgia Law - Against All Defendants)

98. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 97 of this Complaint as though set forth here in full.

99. A person's effort to intimidate, threaten or deter another person from testifying or testifying truthfully or freely is a violation of Georgia criminal law and a recognized Georgia public policy. Among other damages, such actions would outrage or cause mental suffering, shame or humiliation to the ordinary person of ordinary sensibilities. Under Georgia law, anyone injured from such wrongful conduct is entitled to recover damages for such injuries from such wrongful conduct.

100. The Defendants engaged in the wrongful conduct alleged above and cause Plaintiff to suffer direct and proximately caused injuries and damages.

## *COUNT VI*

### (Claim of Invasion Of Private Right To Testify Under Georgia Law - Against All Defendants)

101. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 100 of this Complaint as though set forth here in full.

102. A person is protected from any wrongful intrusion. Every citizen of Georgia has a private right to testify and to testify truthfully in a pending action in court. Any wrongful intrusion of that right is wrongful and amounts to a trespass to that person's right to privacy in violation of Georgia law.

103. By engaging in the acts alleged herein, Defendants trespassed and intruded on Carpenter's

private right to testify and to testify freely and truthfully and such tortious acts by Defendants caused Carpenter to suffer direct and proximately caused injuries and damages.

## *COUNT VII*

### (Claim For Joint Wrongdoing Under O.C.G.A. 51-12-30)

104. Plaintiff restates and realleges the allegations contained in ¶¶ 1 through 103 of this Complaint as though set forth here in full.

105. O.C.G.A. § 51-12-30 states, "In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury."

106. Each of the Defendants (along with others, including Morillo) maliciously procured injury to be done to Carpenter as an actionable wrong and is a joint wrongdoer and thereby subject to joint and several liability with each other person who committed wrongful injury to Carpenter.

107. Carpenter suffered direct and proximately caused damages from Defendants' joint conduct under O.C.G.A. § 51-12-30 and each Defendant's wrongful procurement of injury upon Carpenter.

## *PRAYER FOR RELIEF*

WHEREFORE, Plaintiff respectfully prays:

A. That a declaratory judgment be issued declaring that the actions of Defendants against Plaintiff alleged herein violated 42 U.S.C. § 1985(2);

B. That the court permanently enjoin any future violations of 42 U.S.C. § 1985(2) by Defendants including those violations that are designed to deter and prevent witnesses from testifying truthfully and freely in the *Williams* Lawsuit;

C. That judgment be entered in favor of Plaintiff for an amount, equal to his back pay and benefit damages, and front pay and benefit damages together with interest at a rate of not less than 6% per annum;

D. That judgment be entered in favor of Plaintiff for compensatory damages;

E. That judgment be entered in favor of Plaintiff for treble damages and punitive damages;

F. That Plaintiff be granted his attorneys' fees, experts' fees, and the costs and expenses of this litigation;

G. That Plaintiff be awarded such other and further legal and equitable relief as may be found appropriate and as the Court may deem just or equitable; and

H. That the Court retain jurisdiction over Defendants until such time as it is satisfied that they have remedied the practices complained of and are determined to be in full compliance with the law.

Respectfully submitted,

s/Thomas J. Munger
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# APPENDIX F — ORDER ON DEFENDANT MOHAWK INDUSTRIES, INC.'S MOTION TO DISMISS, FILED MAY 2, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-0049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC.,
PATRICIA SILVERS,
JEFFREY BRIGGS, and
SCOTT HIGGINS,

Defendants.

## ORDER

This case is before the Court on the Court's own Motion.

On March 15, 2007, Plaintiff filed this lawsuit. On April 17, 2007, Defendant Mohawk Industries, Inc. ("Mohawk") filed a Motion to Dismiss. (Docket Entry No. 9.) On May 1, 2007, Plaintiff responded to the Motion to Dismiss, in part, by filing a First Amended Complaint. (Docket Entry No. 10.) At this point, no Defendant has filed an Answer to the Motion to Dismiss.

As an initial matter, the Court observes that Federal Rule of Civil Procedure 15(a) provides: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). "For purposes of this Rule, a motion to dismiss is not a responsive pleading." *Williams v. Bd. of Regents*, 477 F.3d 1282, 1291 (11th Cir. 2007) (citing *Chilivis v. SEC*, 673 F.2d 1205, 1209 (11th Cir. 1982)). Because no Defendant had filed an Answer when Plaintiff filed his First Amended Complaint, Plaintiff could file his First Amended Complaint without obtaining permission from the Court, notwithstanding the fact that Mohawk had filed a Motion to Dismiss. *Id.*

Plaintiff's First Amended Complaint, however, affects Mohawk's Motion to Dismiss for several reasons. First, the proper filing of an amended pleading ordinarily causes the pleading that has been amended to become moot. The Motion to Dismiss, however, pertains only to the original Complaint. Further, the First Amended Complaint may moot some of the arguments raised in Mohawk's Motion to Dismiss.[1] Finally, Mohawk may wish to raise new arguments in connection with the First Amended Complaint that Mohawk did not raise in its initial Motion to Dismiss. Requiring Mohawk to raise those issues in a reply brief in support of its original Motion to Dismiss may place Mohawk at a disadvantage, and would require Plaintiff to request permission to file a surreply in order to address the new arguments. Under those circumstances, the Court finds that it is appropriate to deny Mohawk's current Motion to Dismiss without prejudice, and to permit Mohawk to file another Motion to Dismiss that specifically addresses Plaintiff's First Amended Complaint.

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[1] By making this comment, the Court does not intend to express an opinion as to the validity of any of the arguments raised in the Motion to Dismiss or the related Response.

ACCORDINGLY, the Court **DENIES AS MOOT AND WITHOUT PREJUDICE** Mohawk's Motion to Dismiss [9]. Mohawk may file another Motion to Dismiss or a responsive pleading addressing Plaintiff's First Amended Complaint within the applicable time period for doing so.

IT IS SO ORDERED, this the 2nd day of May, 2007.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

# APPENDIX G — PLAINTIFF'S INITIAL DISCLOSURES, DATED MAY 17, 2007

## UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION
FILE NO. 4:07-CV-049-HLM

**ACTION UNDER**
**42 U.S.C. § 1985(2)**
**AND CLAIMS UNDER**
**GEORGIA LAW**

**JURY TRIAL DEMANDED**

NORMAN CARPENTER,

Plaintiff

vs.

MOHAWK INDUSTRIES, INC.;
PATRICIA SILVER;
JEFFERY BRIGGS;
SCOTT HIGGINS;

Defendants.

*Appendix G*

# PLAINTIFF'S INITIAL DISCLOSURES

(1) State precisely the classification of the cause of action being filed, a brief factual outline of the case including plaintiff's contentions as to what defendant did or failed to do, and a succinct statement of the legal issues in the case.

***RESPONSE:***

In 2004, a group of Mohawk hourly employees filed a class action lawsuit in this Court against Mohawk alleging violations of federal and Georgia RICO based on an assertion that Mohawk knowingly hired illegal aliens through arrangements with temporary hiring agencies in order to suppress wages paid to its legally employed employees (hereinafter "*Williams*").

On June 1, 2006, Mohawk Industries, Inc. ("Mohawk") hired Norman Carpenter as a Shift Supervisor. At the time, Carpenter had no knowledge that Mohawk knowingly hired illegal aliens through temporary hiring agencies. Mohawk's Senior Employment Coordinator Becky Hale had previously told one of Carpenter's hourly employees, Christina Martinez, that she was aware that Mohawk hired illegal aliens and that, if such illegal aliens came to Mohawk HR with a social security number and a false identification, Hale would hire them and Mohawk could employ them.

In November 2006, Carpenter inquired of his temporary employees if they wished to seek to be hired directly by Mohawk. In this process (sometimes using Martinez as his interpreter) Carpenter learned that virtually all of the 12 to 15 temporary Mohawk employees on his Shift did not have proper authorization to work in the United States.

On November 28, 2006, Carpenter sent an email to Hale stating that "90% of the people that come through the temp (services) do not have good papers" and that this is why "the people working today here through a temp [service] do not have one of the two things either a GA I.d. or good papers through the I.N.S."

At the time, Carpenter had no idea of the danger created by his email to Mohawk. Carpenter did not know that Hale was instrumental in Mohawk's strategy to hire illegal aliens through temp services. More importantly, he did not know that Mohawk was facing monumental monetary exposure in *Williams* because of these very acts. Most directly, Carpenter was unaware that Mohawk had engaged an enterprise to suppress evidence in *Williams* and to prevent through unlawful means anyone from testifying or providing evidence against it in *Williams*.

Mohawk HR never responded to Carpenter's email to Hale. However, Mohawk HR, Mohawk Operations, Mohawk Legal, and Mohawk's chief trial counsel in *Williams* recognized that, if Carpenter testified about his email in *Williams*, that testimony alone could trigger

Mohawk's liability in *Williams* - exposing it to the biggest financial legal risk in its history.

Accordingly, on December 4, Mohawk required Carpenter to be interrogated by its trial counsel in *Williams*, Juan Morillo, Esq. Carpenter alleges that Morillo engaged in statements and acts that were designed to intimidate and implicitly threaten Carpenter with the goal of causing him to state that he was not sure that there were any illegal aliens on his shift or, at a minimum, state that his 90% estimate was an exaggeration. Morillo did not achieve his intended goal.

Accordingly, on December 5, Carpenter was called into a meeting with the individual defendants in this action. HR executive Silver told Carpenter that she knew about his interview with Morillo and that, as a result, the lawyers recommended and the company decided to terminate Carpenter's employment. Moreover, she told Carpenter that it was *he* that had violated criminal law by illegally harboring illegal aliens. Carpenter alleges that the Defendants (with Morillo and others) illegally sought to prevent Carpenter from testifying or testifying truthfully in *Williams*.

Aware of Martinez's involvement in the events leading to Carpenter's knowledge of illegal alien hires by Mohawk, Silver then threatened Martinez that she would be terminated if she again involved herself in these issues - an obvious threat that she would be fired if she testified as to her knowledge in *Williams*.

Mohawk followed that threat up with a threat to Martinez that she could be terminated if she talked about this lawsuit. Moreover, since the filing of this action, Mohawk management has conducted surveillance on Martinez in a manner to intimidate her from testifying in this lawsuit or in *Williams.*

In this action, Carpenter alleges that the actions of Defendants against him violated 42 U.S.C. § 1985(2), Georgia RICO, and constituted torts under Georgia law.

(2) Describe in detail all statutes, codes, regulations, legal principles, standards and customs or usages, and illustrative case law which plaintiff contends are applicable to this action.

***RESPONSE:*** Plaintiffs rely on 42 U.S.C. § 1985(2), O.C.G.A. § 16-14-4 and O.C.G.A. § 51-12-30 as well as the statutes defining terms under those provisions and the interpretive case law thereunder. Plaintiffs also rely under Georgia common law principles under the torts of invasion of privacy of the right to testify, violation of Georgia public policy, intentional infliction of emotional distress, and interference with contractual relations.

Relevant case law includes:

*McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031 (11th Cir. 2000)

*O'Neal v. Garrison*, 263 F.3d 1317 (11th Cir. 2001)

*Haddle v. Garrison,* 525 U.S. 121 (1998)

*Williams General Corp. v. Stone,* 279 Ga. 428, 429, 614 S.E.2d 758 (2005)

*Troy v. Interfinancial, Inc.,* 171 Ga. App. 763, 320 S.E.2d 872 (1984)

*Yarbray v. Southern Bell,* 261 Ga. 703, 409 S.E.2d 835 (1991) *Insight Technology, Inc. v. Freightcheck, LLC,* 280 Ga. App. 19, 24-25, 633 S.E.2d 373 (2006)

(3) Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your claims or defenses, unless solely for impeachment, identifying the subjects of the information. (Attach witness list to Initial Disclosures as Attachment A.)

***RESPONSE:*** See Attachment A.

(4) Provide the name of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. For all experts described in Fed.R.Civ.P.26(a)(2)(B), provide a separate written report satisfying the provisions of that rule. (Attach expert witness list and written list and written reports to Response to Initial Disclosures as Attachment B.)

***RESPONSE:*** Plaintiff has not yet identified any witness to present evidence under FRE 702, 703 or 705.

Plaintiff will promptly amend this disclosure at the time he identifies such witness or witnesses.

(5) Provide a copy of, or a description by category and location of, all documents, data compilations, and tangible things in your possession, custody, or control that you may use to support your claims or defenses unless solely for impeachment, identifying the subjects of the information. (Attach document list and descriptions to Initial Disclosures as Attachment C.)

***RESPONSE:*** See Attachment C.

(6) In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered, making such documents or evidentiary materials available for inspecting and copying as under Fed.R.Civ.P. 34. (Attach any copies and descriptions to Initial Disclosures as Attachment D.)

***RESPONSE:*** Plaintiffs' damages are continuing, but set forth below is a current categorization of damages that Plaintiffs have suffered thus far and are seeking from Defendants on a joint and several basis:

- Lost back-pay and benefits – to be determined at time of trial

- Lost front-pay and benefits – to be determined at the time of trial

- Compensatory damages – to be determined at the time of trial

- Punitive damages – to be determined at the time of trial

- Interest on the above amounts – to be determined at the time of trial

- Attorneys' fees and costs – to be determined at the conclusion of trial

(7) Attach for inspection and copying under Fed.R.Civ.P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment. (Attach copy of insurance agreement to Initial Disclosures as Attachment E.)

***RESPONSE:*** Not Applicable to Plaintiff.

(8) Disclose the full name, address and telephone number of all persons or legal entities who have a subrogation interest in the cause of action set forth in plaintiff's cause of action and state the basis and extent of such interest.

***RESPONSE:*** None.

This 17th day of May, 2007

Respectfully submitted,

s/ *Thomas J. Munger*
Georgia Bar No. 529609

s/ *Benjamin A. Stone*
Georgia Bar No. 683850

Attorneys for Plaintiff

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Telephone: (404) 815-0829
Facsimile: (404) 815-4687
Email: lawfirm@mungerandstone.com

## ATTACHMENT A TO PLAINTIFF'S RESPONSES TO INITIAL DISCLOSURES

1. **Norman Carpenter**

Mr. Carpenter will testify about the allegations in his Complaint.

2. **Christina Martinez**

Ms. Martinez will testify about her conversations with Becky Hale regarding the hiring of illegal aliens, her knowledge of illegal aliens hired by Mohawk, her communications with Mr. Carpenter, her communications with Ms. Silver, and her communications with management about this lawsuit.

3. **Temporary Employees On Norman Carpenter's Former Shift**

These individuals (to be identified in discovery) will testify about Mohawk's knowledge of their work status and their conversation with Mr. Carpenter about the same.

4. **Patricia Silver**

Ms. Silver will testify about her actions towards Mr. Carpenter and Ms. Martinez after she learned of Mr. Carpenter's email to Ms. Silver and her communications with others at Mohawk about the same.

5. **Jeffery Briggs**

Mr. Briggs will testify about his actions towards Mr. Carpenter and Ms. Martinez after he learned of Mr. Carpenter's email to Ms. Silver and his communications with others at Mohawk about the same.

6. **Scott Higgins**

Mr. Higgins will testify about his actions towards Mr. Carpenter and Ms. Martinez after he learned of Mr. Carpenter's email to Ms. Silver and his communications with others at Mohawk about the same.

7. **Juan Morillo**

Mr. Morillo will testify about his actions with respect to Mr. Carpenter and Ms. Martinez after he learned about Mr. Carpenter's email to Ms. Hale, including his communications with Mr. Carpenter and Ms. Martinez, and his communications with Mohawk.

8. **Ms. Lang (Paralegal for Juan Morillo)**

Ms. Lang will testify about the events at Mr. Morillo's interrogation of Mr. Carpenter.

9. **Becky Hale**

Ms. Hale will testify about her knowing hiring of illegal aliens at Mohawk; her actions regarding Plaintiff's email to her; her threat to Ms. Martinez; and related topics.

10. **Angela Bell**

Ms. Bell will testify about her April 12, 2007 interview of Ms. Martinez.

11. **Ann Reynolds**

Ms. Reynolds will testify about her April 12, 2007 interview of Ms. Martinez.

12. **Others**

Plaintiff reserves the right to identify additional individuals during the discovery period and thereafter. Such individuals will include other illegal alien employees, and other individuals involved in the actions taken against Plaintiff.

## ATTACHMENT C TO PLAINTIFF'S RESPONSES TO INITIAL DISCLOSURES

1. Plaintiff's November 28, 2006 email to Becky Hale and Becky Hale's email to others referring to that email.

2. Decision from Georgia Department of Labor dated January 3, 2007 granting Plaintiff unemployment compensation benefits because of his termination by Mohawk.

3. Written compliments of performance of Plaintiff at Mohawk.

4. Mohawk's Open Door & Complaint Resolution Policy

5. Mohawk's Corrective Action Policy

6. Mohawk's Standards of Conduct and Business Ethics

# APPENDIX H — JOINT PRELIMINARY REPORT AND DISCOVERY PLAN, DATED MAY 17, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC., PATRICIA SILVER, JEFFERY BRIGGS, SCOTT HIGGINS,

Defendant.

## JOINT PRELIMINARY REPORT AND DISCOVERY PLAN

### 1. Description of Case:

**(a) Describe briefly the nature of this action.**

This action involves the claims of a former Mohawk Industries, Inc. ("Mohawk") Shift Supervisor, Norman Carpenter, against Mohawk and three of its employees, Patricia Silver, Jeffrey Briggs, and Scott Higgins. Plaintiff alleges that the Defendants and others conspired against him to engage in actions with the intent to deter him by intimidation or threat from testifying or testifying freely, fully, and truthfully in another case pending in this Court and that Plaintiff was injured by these actions in violation of 42 U.S.C. § 1985(2). Plaintiff also claims that Defendants' alleged conduct violated Georgia's RICO Statute, O.C.G.A. § 16-14-4, and was tortious under Georgia law. Defendants deny Plaintiff's allegations.

**(b) Summarize, in the space provided below, the facts of this case. The summary should not be argumentative nor recite evidence.**

Numerous factual allegations and numerous factual assertions in response to the allegations are in dispute. In is undisputed that Plaintiff was employed by Mohawk as a Shift Supervisor at Mohawk's Union Grove Road facility in Calhoun, Georgia on June 1, 2006 and that Mohawk terminated Plaintiff's employment on December 5, 2006.

**(c) The legal issues to be tried are as follows:**

1. Whether Plaintiff has stated a claim upon which relief can be granted.

2. Whether Plaintiff has sufficiently pled each of the claims in the Complaint.

3. Whether the Defendants violated 42 U.S.C. § 1985(2).

4. Whether Defendants violated the Georgia RICO statute.

5. Whether Defendants' actions amounted to outrageous conduct which inflicted severe emotional distress upon the Plaintiff.

6. Whether the individual Defendants tortiously interfered with the employment relationship between Mohawk and Plaintiff.

7. Whether Georgia law recognizes a claim for Tortious Violation of Public Policy and whether Plaintiff can prove such a claim based on the Defendants' actions.

8. Whether Georgia law recognizes a tort claim for Invasion of Private Right to Testify and whether Plaintiff can prove such a claim based on the Defendants' actions.

9. Whether Plaintiff has a claim for Joint Wrongdoing under O.C.G.A. § 51-12-30 for Defendants' actions.

10. Whether Plaintiff has suffered damages.

11. Whether Plaintiffs is entitled to punitive damages.

12. Whether Defendants have valid affirmative defenses.

**(d) The cases listed below (include both style and action number) are:**

**(1) Pending Related Cases:** *Mohawk v. Williams*, Civil Action File No. 4:04-CV-0003-HLM

**(2) Previously Adjudicated Related Cases:** None

**2. This case is complex because it possesses one (1) or more of the features listed below (please check):**

**_______(1) Unusually large number of parties**
**_______(2) Unusually large number of claims or defenses**
**_______(3) Factual issues are exceptionally complex**
**_______(4) Greater than normal volume of evidence**
**_______(5) Extended discovery period is needed**
**_______(6) Problems locating or preserving evidence**
**_______(7) Pending parallel investigations or action by government**
**_______(8) Multiple use of experts**
**_______(9) Need for discovery outside United States boundaries**
**_______(10) Existence of highly technical issues and proof**

**3. Counsel:**

**The following individually-named attorneys are hereby designated as lead counsel for the parties:**

| | |
|---|---|
| **Plaintiff:** | Thomas J. Munger<br>Munger & Stone, LLP<br>999 Peachtree Street, NE<br>Suite 2850<br>Atlanta, Georgia 30309 |
| **Defendants:** | Randall Allen<br>Alston & Bird LLP<br>1201 West Peachtree Street, N.W.<br>One Atlantic Center<br>Atlanta, GA 30309-3424 |

**4. Jurisdiction:**

**Is there any question regarding this Court's jurisdiction?**

( ) Yes (X) No

**If "yes," please attach a statement not to exceed one (1) page, explaining the jurisdictional objection. When there are multiple claims, identify and discuss separately the claim(s) on which the objection is based. Each objection should be supported by authority.**

**5. Parties to this Action:**

**(a) The following persons are necessary parties who have not been joined:** None.

**(b) The following persons are improperly joined as parties:** None.

**(c) The names of the following parties are either inaccurately stated or necessary portions of their names are omitted:** None.

**(d) The parties shall have a continuing duty to inform the Court of any contentions regarding unnamed parties necessary to this action or any contentions regarding misjoinder of parties or errors in the statement of a party's name.**

**6. Amendments to the Pleadings:**

**Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Fed. R. Civ. P. 15. Further instructions regarding amendments are contained in Local Rule 15.**

**(a) List separately any amendments to the pleadings which the parties anticipate will be necessary:**

No amendments to the pleadings are anticipated at this time.

(b) Amendments to the pleadings submitted LATER THAN THIRTY (30) DAYS after the Joint Preliminary Report and Discovery Plan is filed, or should have been filed, will not be accepted for filing, unless otherwise permitted by law.

### 7. Filing Times for Motions

All motions should be filed as soon as possible. The local rules set specific filing limits for some motions. These times are restated below.

All other motions must be filed WITHIN THIRTY (30) DAYS after the beginning of discovery, unless the filing party has obtained prior permission of the Court to file later. Local Rule 7.1A(2).

(a) *Motions to Compel:* before the close of discovery or within the extension period allowed in some instances. Local Rule 37.1.

(b) *Summary Judgment Motions:* within twenty (20) days after the close of discovery, unless otherwise permitted by Court order. Local Rule 56.1.

(c) *Other Limited Motions:* Refer to Local Rules 7.2A; 7.2B, and 7.2E, respectively, regarding filing limitations for motions pending on removal, emergency motions, and motions for reconsideration.

(d) *Motions Objecting to Expert Testimony: Daubert* motions with regard to expert testimony no later than the date that the proposed pretrial order is submitted. Refer to Local Rule 7.2F.

**8. Initial Disclosures:**

**The parties are required to serve initial disclosures in accordance with Fed. R. Civ. P. 26. If any party objects that initial disclosures are not appropriate, state the party and basis for the party's objection.**

No party objects to the initial disclosures.

**9. Request for Scheduling Conference:**

**Does any party request a scheduling conference with the Court? If so, please state the issues which could be addressed and the position of each party.**

The parties do not request a scheduling conference.

**10. Discovery Period**

**The discovery period commences thirty (30) days after the appearance of the first defendant by answer to the complaint. As stated in LR 26.2A, responses to initiated discovery must be completed before expiration of the assigned discovery period.**

**Cases in this Court are assigned to one of the following three (3) discovery tracks: (a) zero (0)-months discovery period, (b) four (4)-months discovery period, and (c) eight (8)-months discovery period. A chart showing the assignment of cases to a discovery track by filing category is contained in Appendix F. The track to which a particular case is assigned is also stamped on the complaint and service copies of the complaint at the time of filing. Please state below the subjects on which discovery may be needed:**

**(a) Plaintiff's Subjects of Discovery:**

Plaintiffs will need discovery on Mohawk's alleged hiring and retention of illegal aliens as temporary employees as reported to Mohawk by Plaintiff by email on November 28, 2006; discovery on Mohawk's assertion that Plaintiff had the ability to hire employees at Mohawk and that he hired and/or retained or attempted to hire and retain undocumented workers at Mohawk; discovery on all actions taken and all communications by Mohawk, any member of Mohawk management, and any Mohawk counsel (including outside counsel) in response to Plaintiff's November 28, 2006 email; discovery on all events at and communications about Mohawk's meetings with Plaintiff on December 4 and 5, 2006; discovery on Mohawk's response with respect to all other Mohawk employees who Mohawk has contended attempted to hire and/or attempted to retain an undocumented worker; discovery on all other Mohawk employees who have reported allegations to Mohawk that Mohawk has hired, retained or employed one or more undocumented worker, all facts relating to each such report and all of Mohawk's actions in response to each such report; the identification of the individuals and the documents presented to Mohawk and/or the temporary service at the time of hire by all temporary employees who worked at any time on Plaintiff's shift during Plaintiffs employment with Mohawk and all temporary workers who hired with the approval of Becky Hale and/or Patricia Silver.

(b) **Defendants' Subjects of Discovery:**

Defendants will need discovery as to the merits' of Plaintiff's allegations including, but not limited to, the following: Plaintiff's communications with Mohawk and his alleged attempts to hire and retain undocumented workers, Plaintiff's work history with Mohawk, and Plaintiff's communications with Christina Martinez.

**If the parties anticipate that additional time beyond that allowed by the assigned discovery track will be needed to complete discovery or that discovery should be conducted in phases or be limited to or focused upon particular issues, please state those reasons in detail below:**

None.

11. **Discovery Limitation:**

**What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or Local Rules of this Court, and what other limitations should be imposed.**

None.

12. **Other Orders:**

**What other orders do the parties think that the Court should enter under Rule 26(c) or under Rule 16(b) and (c)?**

Given the allegations in the Complaint, Defendants believe the Court will need to enter an order limiting discovery and approving appropriate protections related to Plaintiff's anticipated efforts to seek information protected by the attorney-client privilege.

**13. Settlement Proposal:**

**(a) Lead counsel for the parties certify by their signatures below that they conducted a Rule 26(f) conference that was held on April 26, 2007 and May 16, 2007 that they participated in settlement discussions. Other persons who participated in the settlement discussions are listed according to party.**

**For Plaintiff:**

**Lead counsel (signature): s/Thomas J. Munger**

**Other participants:**

**For Defendants Mohawk, Silver, Briggs, and Higgins:**

**Lead counsel (signature): s/Randall Allen**

**Other participants:**

**(b) All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears that there is now:**

**( ) A possibility of settlement before discovery.**

**(x) A possibility of settlement after discovery.**

**( ) A possibility of settlement, but a conference with the judge is needed.**

( ) No possibility of settlement.

(c) Counsel () do or (x) do not intend to hold additional settlement conferences among themselves prior to the close of discovery. The proposed date of the next settlement conference is ____.

(d) The following specific problems have created a hindrance to settlement of this case: N/A

14. Trial by Magistrate Judge:

Note: Trial before a Magistrate Judge will be by jury trial if a party is otherwise entitled to a jury trial.

(a) The parties ( ) do consent to having this case tried before a magistrate judge of this court. A completed Consent to Jurisdiction by a United States Magistrate Judge form has been submitted to the clerk of this court this _____ day of __________, 20__.

(b) The parties (X) do not consent to having this case tried before a magistrate judge of this court.

Respectfully submitted, this 17th day of May, 2007.

/s/ Thomas J. Munger
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*Attorneys for Defendant*
*Mohawk Industries, Inc.*

*Appendix H*

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC., PATRICIA SILVER, JEFFERY BRIGGS, SCOTT HIGGINS,

Defendant.

## SCHEDULING ORDER

Upon review of the information contained in the Preliminary Report and Discovery Schedule form completed and filed by the parties, the Court orders that the time limits for adding parties, amending the pleadings, filing motions, completing discovery, and discussing settlement are as stated in the above completed form, except as herein modified:

IT IS SO ORDERED, this __ day of _________, 2007.

HON. HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

# APPENDIX I — DEFENDANT MOHAWK INDUSTRIES, INC.'S INITIAL DISCLOSURES, DATED MAY 17, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC.,
PATRICIA SILVER, JEFFERY BRIGGS,
SCOTT HIGGINS,

Defendant.

## DEFENDANT MOHAWK INDUSTRIES, INC.'S RULE 26 INITIAL DISCLOSURES

Pursuant to Federal Rule of Civil Procedure 26(a)(1) and Local Rule 26.1, Defendant Mohawk Industries, Inc. ("Mohawk") makes these initial disclosures:

*(1) If the defendant is improperly identified, state defendant's correct identification and state whether defendant will accept service of an amended summons and complaint reflecting the information furnished in this disclosure response.*

***RESPONSE:***

Mohawk is properly identified.

*(2) Provide the names of any parties whom defendant contends are necessary parties to this action, but who have not been named by plaintiff. If defendant contends that there is a question of misjoinder of parties, provide the reasons for defendant's contention.*

***RESPONSE:***

Mohawk does not contend that any necessary parties to this action have not been named by Plaintiff.

*(3) Provide a detailed factual basis for the defense or defenses and any counterclaims or crossclaims asserted by defendant in the responsive pleading.*

***RESPONSE:***

Mohawk has not yet filed its answer in this case or any counterclaims against the Plaintiff.

Mohawk denies Plaintiff's allegations as set forth in the Amended Complaint. All of Mohawk's employment decisions with respect to Plaintiff were based on legitimate reasons and were not made in order to deter or intimidate Plaintiff from testifying in any matter. Mohawk did not threaten the Plaintiff in any way, nor did it conspire to threaten or intimidate the Plaintiff.

*(4) Describe in detail all statutes, codes, regulations, legal principles, standards and customs or usages, and illustrative case law which defendant contends are applicable to this action.*

***RESPONSE:***

(a) ***Statutes:***

1. 42 U.S.C. § 1985(2) prohibits conspiracies to intimidate or threaten a witness in federal court.
2. Georgia's RICO statute including O.C.G.A. § 16-14-4(a)-(c) and O.C.G.A. § 16-14-3(8)(A), (9)(A).
3. O.C.G.A. § 16-10-93(a) is one of the criminal statutes relied upon by Plaintiff, related to threats to witnesses.
4. 18 U.S.C. § 1512 is one of the criminal statutes relied upon by Plaintiff, related to threats to witnesses.
5. O.C.G.A. § 51-12-30 is Georgia's statute regarding liability of joint wrongdoers.

(b) ***Regulations:***

None.

**(c) *Standards:***

None.

**(d) *Illustrative Cases that are Applicable to this Action***

Mohawk contends that case law interpreting and applying the federal and state statutes cited by Plaintiff in his First Amended Complaint and Georgia cases relating to the common law claims brought by Plaintiff, including, but not limited to those cases cited in Mohawk's Memorandum of Law in Support of Mohawk's Motion to Dismiss in this matter will be applicable in this case. Case law concerning Georgia's at-will employment doctrine is also applicable in this case.

Mohawk reserves the right to identify additional applicable statutes, regulations, standards and/or case law as may be discovered in the course of Defendant's further analysis, research, and discovery.

*(5) Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your claims or defenses, unless solely for impeachment, identifying the subjects of the information. (Attach witness list to Initial Disclosures as Attachment A.)*

***RESPONSE:***

The persons identified in Attachment A hereto are believed to have discoverable information that Mohawk may use to support its defenses in this matter. Each individual listed is believed to have knowledge concerning Plaintiff's employment with Mohawk and the respective meetings described in the Amended Complaint. Mohawk reserves its right to amend this list based on the reasonable assumption that additional individuals/entities with discoverable information will become known to Mohawk during the course of discovery.

*(6) Provide the name of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. For all experts described in Fed. R. Civ. P. 26(a)(2)(B), provide a separate written report satisfying the provisions of that rule. (Attach expert witness list and written reports to Initial Disclosures as Attachment B.)*

***RESPONSE:***

Mohawk has not identified any experts at this time who will or may be used at trial to present evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence. If Mohawk identifies an expert as described in Federal Rule of Civil Procedure 26(a)(2)(B), a report as required by that rule will be provided in accordance with the Federal Rules of Civil Procedure and the Local Rules of this Court.

*(7) Provide a copy of or a description by category and location of all documents, data compilations, and tangible things in your possession, custody, or control that you may use to support your claims or defenses unless solely for impeachment, identifying the subjects of the information. (Attach document list and descriptions to Initial Disclosures as Attachment C.)*

***RESPONSE:***

Mohawk may use the categories of documents identified in Attachment C hereto to support their defenses, which are in Mohawk's possession, custody or control and located at the offices of Mohawk's counsel, Alston & Bird LLP, 1201 West Peachtree Street, Atlanta, Georgia, 30309.

Mohawk is engaged in the continuing investigation of the matters identified in the Initial Disclosures and expect to obtain additional information during discovery. Accordingly, Mohawk reserves the right to supplement their list of categories of documents and other tangible things.

*(8) In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of, or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered, making such documents or*

*evidentiary material available for inspection and copying as under Fed.R.Civ.P. 34. (Attach any copies and descriptions to Initial Disclosures as Attachment D.)*

***RESPONSE:***

Mohawk has not made a claim for damages to date, but reserves the right to seek an award of attorneys' fees.

*(9) If defendant contends that some other person or legal entity is, in whole or in part, liable to the plaintiff or defendant in this matter, state the full name, address, and telephone number of such person or entity and describe in detail the basis of such liability.*

***RESPONSE:***

Mohawk denies that it (and the other Defendants) are liable to Plaintiff in this action and denies that any other person or legal entity is liable to Plaintiff on any claim raised in this action.

*(10) Attach for inspection and copying as under Fed.R. Civ.P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments to satisfy the judgment. (Attach copy of insurance agreement to Responses to Initial Disclosures as Attachment E.)*

***RESPONSE:***

At this time, Mohawk knows of no insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment.

Pursuant to Federal Rule of Civil Procedure 26, Defendant reserves the right to supplement these Initial Disclosures as discovery or their own investigation proceeds.

Respectfully submitted, this 17th day of May, 2007.

/s/ Daniel F. Diffley
RANDALL L. ALLEN
Georgia State Bar No. 011436
DANIEL F. DIFFLEY
Georgia State Bar No. 221703
LEIGH R. RHOADS
Georgia State Bar No. 142488

*Attorneys for Mohawk*
*Industries, Inc.*

ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
(404) 881-7777 (Facsimile)

## ATTACHMENT A

| Name | **Address and Telephone Number** |
|---|---|
| Juan P. Morillo | Sidley Austin LLP<br>1501 K. Street NW<br>Washington, D.C. 20005<br>(202) 736-8000 |
| Katie M. Ladd | Sidley Austin LLP<br>1501 K. Street NW<br>Washington, D.C. 20005<br>(202) 736-8000 |
| Becky Hale | May be contacted through counsel for the Defendant |
| Patricia Silver | May be contacted through counsel for the Defendant |
| Jeffrey Briggs | May be contacted through counsel for the Defendant |
| Scott Higgins | May be contacted through counsel for the Defendant |
| Sal Perillo | May be contacted through counsel for the Defendant |
| Kirk Prather | May be contacted through counsel for the Defendant |
| Norman Carpenter | Known to Plaintiff's counsel |
| Christina Martinez | Known to Plaintiff's counsel |

# ATTACHMENT C

1. Documents relating to Plaintiff's employment with Mohawk.

# APPENDIX J — SCHEDULING ORDER, FILED MAY 17, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC.,
PATRICIA SILVER, JEFFERY BRIGGS,
SCOTT HIGGINS,

Defendant.

## SCHEDULING ORDER

Upon review of the information contained in the Preliminary Report and Discovery Schedule form completed and filed by the parties, the Court orders that the time limits for adding parties, amending the pleadings, filing motions, completing discovery, and discussing settlement are as stated in the above completed form, except as herein modified:

IT IS SO ORDERED, this 18th day of May, 2007.

s/ Harold L. Murphy
HON. HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

*Appendix J*

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC.,
PATRICIA SILVER, JEFFERY BRIGGS,
SCOTT HIGGINS,

Defendant.

## JOINT PRELIMINARY REPORT AND DISCOVERY PLAN

### 1. Description of Case:

#### (a) Describe briefly the nature of this action.

This action involves the claims of a former Mohawk Industries, Inc. ("Mohawk") Shift Supervisor, Norman Carpenter, against Mohawk and three of its employees, Patricia Silver, Jeffrey Briggs, and Scott Higgins. Plaintiff alleges that the Defendants and others conspired against him to engage in actions with the intent to deter him by intimidation or threat from testifying or testifying freely, fully, and truthfully in another case pending in this Court and that Plaintiff was injured by these actions in violation of 42 U.S.C. § 1985(2). Plaintiff also claims that Defendants' alleged conduct violated Georgia's RICO Statute, O.C.G.A. § 16-14-4, and was tortious under Georgia law. Defendants deny Plaintiff's allegations.

**(b) Summarize, in the space provided below, the facts of this case. The summary should not be argumentative nor recite evidence.**

Numerous factual allegations and numerous factual assertions in response to the allegations are in dispute. In is undisputed that Plaintiff was employed by Mohawk as a Shift Supervisor at Mohawk's Union Grove Road facility in Calhoun, Georgia on June 1, 2006 and that Mohawk terminated Plaintiff's employment on December 5, 2006.

**(c) The legal issues to be tried are as follows:**

1. Whether Plaintiff has stated a claim upon which relief can be granted.

2. Whether Plaintiff has sufficiently pled each of the claims in the Complaint.

3. Whether the Defendants violated 42 U.S.C. § 1985(2).

4. Whether Defendants violated the Georgia RICO statute.

5. Whether Defendants' actions amounted to outrageous conduct which inflicted severe emotional distress upon the Plaintiff.

6. Whether the individual Defendants tortiously interfered with the employment relationship between Mohawk and Plaintiff.

7. Whether Georgia law recognizes a claim for Tortious Violation of Public Policy and whether Plaintiff can prove such a claim based on the Defendants' actions.

8. Whether Georgia law recognizes a tort claim for Invasion of Private Right to Testify and whether Plaintiff can prove such a claim based on the Defendants' actions.

9. Whether Plaintiff has a claim for Joint Wrongdoing under O.C.G.A. § 51-12-30 for Defendants' actions.

10. Whether Plaintiff has suffered damages.

11. Whether Plaintiffs is entitled to punitive damages.

12. Whether Defendants have valid affirmative defenses.

**(d) The cases listed below (include both style and action number) are:**

**(1) Pending Related Cases:** *Mohawk v. Williams*, Civil Action File No. 4:04-CV-0003-HLM

**(2) Previously Adjudicated Related Cases:** None

**2. This case is complex because it possesses one (1) or more of the features listed below (please check):**

____ **(1) Unusually large number of parties**
____ **(2) Unusually large number of claims or defenses**
____ **(3) Factual issues are exceptionally complex**
____ **(4) Greater than normal volume of evidence**
____ **(5) Extended discovery period is needed**
____ **(6) Problems locating or preserving evidence**
____ **(7) Pending parallel investigations or action by government**
____ **(8) Multiple use of experts**
____ **(9) Need for discovery outside United States boundaries**
____ **(10) Existence of highly technical issues and proof**

**3. Counsel:**

**The following individually-named attorneys are hereby designated as lead counsel for the parties:**

**Plaintiff:**
Thomas J. Munger
Munger & Stone, LLP
999 Peachtree Street, NE
Suite 2850
Atlanta, Georgia 30309

**Defendants:**
Randall Allen
Alston & Bird LLP
1201 West Peachtree Street, N.W.
One Atlantic Center
Atlanta, GA 30309-3424

**4. Jurisdiction:**

**Is there any question regarding this Court's jurisdiction?**

( ) Yes (X) No

**If "yes," please attach a statement not to exceed one (1) page, explaining the jurisdictional objection. When there are multiple claims, identify and discuss separately the claim(s) on which the objection is based. Each objection should be supported by authority.**

**5. Parties to this Action:**

**(a) The following persons are necessary parties who have not been joined:** None.

**(b) The following persons are improperly joined as parties:** None.

**(c) The names of the following parties are either inaccurately stated or necessary portions of their names are omitted:** None.

**(d) The parties shall have a continuing duty to inform the Court of any contentions regarding unnamed parties necessary to this action or any contentions regarding misjoinder of parties or errors in the statement of a party's name.**

**6. Amendments to the Pleadings:**

**Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Fed. R. Civ. P. 15. Further instructions regarding amendments are contained in Local Rule 15.**

**(a) List separately any amendments to the pleadings which the parties anticipate will be necessary:**

No amendments to the pleadings are anticipated at this time.

(b) Amendments to the pleadings submitted LATER THAN THIRTY (30) DAYS after the Joint Preliminary Report and Discovery Plan is filed, or should have been filed, will not be accepted for filing, unless otherwise permitted by law.

7. Filing Times for Motions

All motions should be filed as soon as possible. The local rules set specific filing limits for some motions. These times are restated below.

All other motions must be filed WITHIN THIRTY (30) DAYS after the beginning of discovery, unless the filing party has obtained prior permission of the Court to file later. Local Rule 7.1A(2).

(a) *Motions to Compel:* before the close of discovery or within the extension period allowed in some instances. Local Rule 37.1.

(b) *Summary Judgment Motions:* within twenty (20) days after the close of discovery, unless otherwise permitted by Court order. Local Rule 56.1.

(c) *Other Limited Motions:* Refer to Local Rules 7.2A; 7.2B, and 7.2E, respectively, regarding filing limitations for motions pending on removal, emergency motions, and motions for reconsideration.

**(d) *Motions Objecting to Expert Testimony: Daubert* motions with regard to expert testimony no later than the date that the proposed pretrial order is submitted. Refer to Local Rule 7.2F.**

**8. Initial Disclosures:**

**The parties are required to serve initial disclosures in accordance with Fed. R. Civ. P. 26. If any party objects that initial disclosures are not appropriate, state the party and basis for the party's objection.**

No party objects to the initial disclosures.

**9. Request for Scheduling Conference:**

**Does any party request a scheduling conference with the Court? If so, please state the issues which could be addressed and the position of each party.**

The parties do not request a scheduling conference.

**10. Discovery Period**

**The discovery period commences thirty (30) days after the appearance of the first defendant by answer to the complaint. As stated in LR 26.2A, responses to initiated discovery must be completed before expiration of the assigned discovery period.**

**Cases in this Court are assigned to one of the following three (3) discovery tracks: (a) zero (0)-months discovery period, (b) four (4)-months discovery period, and (c) eight (8)-months discovery period. A chart showing the assignment of cases to a discovery track by filing category is contained in Appendix F. The track to which a particular case is assigned is also stamped on the complaint and service copies of the complaint at the time of filing. Please state below the subjects on which discovery may be needed:**

**(a) Plaintiff's Subjects of Discovery:**

Plaintiff's will need discovery on Mohawk's alleged hiring and retention of illegal aliens as temporary employees as reported to Mohawk by Plaintiff by email on November 28, 2006; discovery on Mohawk's assertion that Plaintiff had the ability to hire employees at Mohawk and that he hired and/or retained or attempted to hire and retain undocumented workers at Mohawk; discovery on all actions taken and all communications by Mohawk, any member of Mohawk management, and any Mohawk counsel (including outside counsel) in response to Plaintiff's November 28, 2006 email; discovery on all events at and communications about Mohawk's meetings with Plaintiff on December 4 and 5, 2006; discovery on Mohawk's response with respect to all other Mohawk employees who Mohawk has contended attempted to hire and/or attempted to retain an undocumented worker; discovery on all other Mohawk employees who have reported allegations to Mohawk that Mohawk has hired, retained or employed one or more undocumented worker, all facts relating to each such report and all of Mohawk's actions in response to each such report; the identification of the individuals and the documents presented to Mohawk and/or the temporary service at the time of hire by all temporary employees who worked at any time on Plaintiff's shift during Plaintiff's employment with Mohawk and all temporary workers who hired with the approval of Becky Hale and/or Patricia Silver.

**(b) Defendants' Subjects of Discovery:**

Defendants will need discovery as to the merits' of Plaintiff's allegations including, but not limited to, the following: Plaintiffs communications with Mohawk and his alleged attempts to hire and retain undocumented workers, Plaintiffs work history with Mohawk, and Plaintiff's communications with Christina Martinez.

**If the parties anticipate that additional time beyond that allowed by the assigned discovery track will be needed to complete discovery or that discovery should be conducted in phases or be limited to or focused upon particular issues, please state those reasons in detail below:**

None.

**11. Discovery Limitation:**

**What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or Local Rules of this Court, and what other limitations should be imposed.**

None.

**12. Other Orders:**

**What other orders do the parties think that the Court should enter under Rule 26(c) or under Rule 16(b) and (c)?**

Given the allegations in the Complaint, Defendants believe the Court will need to enter an order limiting discovery and approving appropriate protections related to Plaintiff's anticipated efforts to seek information protected by the attorney-client privilege.

**13. Settlement Proposal:**

**(a) Lead counsel for the parties certify by their signatures below that they conducted a Rule 26(f) conference that was held on April 26, 2007 and May 16. 2007 that they participated in settlement discussions. Other persons who participated in the settlement discussions are listed according to party.**

For Plaintiff:

Lead counsel (signature): s/ Thomas J. Munger

Other participants: ____________

For Defendants Mohawk, Silver, Briggs, and Higgins:

Lead counsel (signature): s/ Randall Allen

Other participants: ____________

(b) All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears that there is now:

( ) A possibility of settlement before discovery.

(x) A possibility of settlement after discovery.

( ) A possibility of settlement, but a conference with the judge is needed.

( ) No possibility of settlement.

(c) Counsel ( ) do or (x) do not intend to hold additional settlement conferences among themselves prior to the close of discovery. The proposed date of the next settlement conference is ____.

(d) The following specific problems have created a hindrance to settlement of this case: N/A

**14. Trial by Magistrate Judge:**

Note: Trial before a Magistrate Judge will be by jury trial if a party is otherwise entitled to a jury trial.

**(a) The parties ( ) do consent to having this case tried before a magistrate judge of this court. A completed Consent to Jurisdiction by a United States Magistrate Judge form has been submitted to the clerk of this court this __ day of__________, 20__.**

**(b) The parties (X) do not consent to having this case tried before a magistrate judge of this court.**

Respectfully submitted, this 17th day of May, 2007.

*/s/ Thomas J. Munger*
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*Attorneys for Defendant*
*Mohawk Industries, Inc.*

# APPENDIX K — DEFENDANT MOHAWK INDUSTRIES, INC.'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT, DATED MAY 18, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC., PATRICIA SILVER, JEFFERY BRIGGS, SCOTT HIGGINS,

Defendant.

## DEFENDANT MOHAWK INDUSTRIES, INC.'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Mohawk Industries, Inc. ("Mohawk") answers Plaintiff's First Amended Complaint ("Amended Complaint") as follows below. Some of Plaintiff's allegations in the First Amended Complaint require Mohawk to address certain communications that are subject to the attorney-client privilege. Mohawk has endeavored to answer the allegations where possible.

However, in so responding to these allegations, Mohawk does not waive its attorney-client privilege.

## *FIRST DEFENSE*

The Amended Complaint fails to state a claim upon which relief can be granted.

## *SECOND DEFENSE*

Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver.

## *THIRD DEFENSE*

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

## *FOURTH DEFENSE*

Plaintiff's claims are barred, in whole or in part, by the doctrine of illegality.

## *FIFTH DEFENSE*

Plaintiff's Georgia RICO claim is constitutionally barred because the statutes upon which Plaintiff bases its claims are void for vagueness.

Mohawk responds to the specific allegations contained in the Amended Complaint as follows:

## *OVERVIEW*

1.

Mohawk admits only that Plaintiff was a former Mohawk Shift Supervisor. Mohawk denies all remaining allegations contained in paragraph 1 of the Amended Complaint.

## *JURISDICTION AND VENUE*

2.

Mohawk admits the allegations contained in paragraph 2 of the Amended Complaint.

3.

Mohawk admits that it resides within the Northern District of Georgia, Rome Division and that Plaintiff was employed by Mohawk. Mohawk admits that venue is appropriate in this court. Mohawk is without knowledge or information sufficient to form a belief as to whether Plaintiff now resides in a county within the Northern District of Georgia, Rome Division.

## *THE PARTIES*

4.

Mohawk admits that Plaintiff was employed as a Shift Supervisor at Mohawk from June 1, 2006 until

December 5, 2006. Mohawk is without knowledge or information sufficient to form a belief as to Norman Carpenter's current residential address.

5.

Mohawk admits the allegations contained in paragraph 5 of the Amended Complaint.

6.

Mohawk admits the allegations contained in paragraph 6 of the Amended Complaint.

7.

Mohawk admits the allegations contained in paragraph 7 of the Amended Complaint.

8.

Mohawk admits the allegations contained in paragraph 8 of the Amended Complaint.

9.

Mohawk admits the allegations contained in paragraph 9 of the Amended Complaint.

## *FACTUAL ALLEGATIONS*

### A. *The Mohawk RICO/IRCA Class Action*

10.

Mohawk admits the allegations contained in paragraph 10 of the Amended Complaint.

11.

Mohawk admits solely that Plaintiffs in the *Williams* case have asserted the allegations contained in Paragraph 11 of the Amended Complaint, but denies those allegations and denies any remaining allegations contained in Paragraph 11 of the Amended Complaint.

12.

Mohawk admits solely that Plaintiffs in the *Williams* case have asserted the allegations contained in Paragraph 12 of the Amended Complaint, but denies those allegations and denies any remaining allegations contained in Paragraph 12 of the Amended Complaint.

13.

Mohawk admits solely that Plaintiffs in the *Williams* case have asserted the allegations contained in Paragraph 13 of the Amended Complaint, but denies those allegations and denies any remaining allegations contained in Paragraph 13 of the Amended Complaint.

14.

Mohawk admits solely that Plaintiffs in the *Williams* case have asserted the allegations contained in Paragraph 14 of the Amended Complaint, but denies those allegations and denies any remaining allegations contained in Paragraph 14 of the Amended Complaint.

15.

Mohawk denies the allegations contained in paragraph 15 of the Amended Complaint.

16.

Mohawk admits only that in its November 6, 2006 Form 10-Q filed with the Securities and Exchange Commission, Mohawk included a paragraph about the *Williams* Lawsuit in its Notes To Condensed Consolidated Financial Statements. Mohawk denies the remaining allegations contained in Paragraph 16 of the Amended Complaint.

17.

Mohawk admits solely that it has retained Sidley Austin and Juan P. Morillo of Sidley Austin to defend Mohawk in the *Williams* lawsuit. Mohawk denies the remaining allegations contained in Paragraph 17 of the Amended Complaint.

18.

Mohawk admits that Mr. Morillo is not licensed to practice law by the state of Georgia and that he was admitted *pro hac vice* to represent Mohawk in the *Williams* lawsuit. Mohawk denies the remaining allegations contained in paragraph 18 of the Amended Complaint.

19.

Mohawk admits the allegations contained in paragraph 19 of the Amended Complaint.

20.

Mohawk denies the allegations contained in paragraph 20 of the Amended Complaint.

### B. *The Events Relating to Plaintiff Carpenter*

21.

Mohawk admits the allegations contained in paragraph 21 of the Amended Complaint.

22.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Amended Complaint, and therefore denies such allegations.

23.

Mohawk admits solely that, as a Shift Supervisor, Plaintiff supervised employees and that the hiring of individuals was handled primarily by Mohawk's Human Resources Department. Mohawk is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 23 of the Amended Complaint, and therefore denies such allegations.

24.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Amended Complaint, and therefore denies such allegations.

25.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the Amended Complaint, and therefore denies such allegations.

26.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Amended Complaint, and therefore denies such allegations.

27.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the Amended Complaint, and therefore denies such allegations.

28.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the Amended Complaint, and therefore denies such allegations.

29.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29 of the Amended Complaint, and therefore denies such allegations.

30.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Amended Complaint, and therefore denies such allegations.

31.

Mohawk admits solely that the regional head of Mohawk's HR Department, Home Division, is Patricia

Silver, and that Becky Hale reported to her. Mohawk further admits that Plaintiff did communicate at times with Becky Hale. Mohawk is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 31 of the Amended Complaint, and therefore denies such allegations.

32.

The document speaks for itself. Mohawk is without knowledge or information sufficient to form a belief as to expectations concerning the referenced document, and therefore denies such allegations. Mohawk denies the remaining allegations contained in paragraph 32 of the Amended Complaint.

33.

Mohawk admits solely that Becky Hale sent the referenced emails to Kirk Prather and to Patricia Silver. The document speaks for itself.

34.

This paragraph of the Amended Complaint is vague and unclear, hindering Mohawk's ability to respond. As such, Mohawk denies the allegations contained in paragraph 34 of the Amended Complaint.

35.

Mohawk denies the allegations contained in paragraph 35 of the Amended Complaint.

36.

The allegations in paragraph 36 describe information protected by the attorney-client privilege. In responding to these allegations, Mohawk does not waive its attorney-client privilege. Mohawk denies the allegations contained in paragraph 36 of the Amended Complaint.

37.

The allegations in paragraph 37 describe information protected by the attorney-client privilege. In responding to these allegations, Mohawk does not waive its attorney-client privilege. Mohawk denies the allegations contained in paragraph 37 of the Amended Complaint.

38.

The allegations in paragraph 38 describe information protected by the attorney-client privilege. In responding to these allegations, Mohawk does not waive its attorney-client privilege. Mohawk denies the allegations contained in paragraph 38 of the Amended Complaint.

39.

Mohawk denies the allegations contained in paragraph 39 of the Amended Complaint.

40.

The allegations in paragraph 40 describe information protected by the attorney-client privilege. In responding to these allegations, Mohawk does not waive its attorney-client privilege. Mohawk denies the allegations contained in paragraph 40 of the Amended Complaint.

41.

Mohawk denies the allegations contained in paragraph 41 of the Amended Complaint.

42.

Mohawk denies the allegations contained in paragraph 42 of the Amended Complaint.

43.

Mohawk admits solely that Juan Morillo flew from Washington, D.C. to Atlanta on or about December 3, 2006 and drove to Calhoun. Mohawk denies the remaining allegations contained in paragraph 43 of the Amended Complaint.

44.

Mohawk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of the Amended Complaint, and therefore denies such allegations.

45.

Mohawk admits solely that Plaintiff was interviewed by Juan Morillo and that Mr. Morillo's legal assistant was also present during this interview. Mohawk denies the remaining allegations in paragraph 45 of the Amended Complaint.

46.

The allegations in paragraph 46 describe information protected by the attorney-client privilege. In responding to these allegations, Mohawk does not waive its attorney-client privilege. Mohawk denies the allegations contained in paragraph 46 of the Amended Complaint.

47.

The allegations in paragraph 47 describe information protected by the attorney-client privilege. In responding to these allegations, Mohawk does not waive its attorney-client privilege. Mohawk denies the allegations contained in paragraph 47 of the Amended Complaint.

48.

Mohawk admits solely that, on December 5, 2006, Plaintiff met with Briggs, Higgins, and Silver. Mohawk also admits that Silver spoke and acted for Mohawk during the meeting. Mohawk denies the remaining allegations contained in Paragraph 48 of the Amended Complaint.

49.

Mohawk admits solely that during the December 5, 2006 meeting, Silver told Plaintiff that his employment with Mohawk was terminated. Mohawk is without sufficient information or knowledge to admit or deny whether Plaintiff was "stunned" by his termination, and therefore denies such allegations. Mohawk denies the remaining allegations contained in paragraph 49 of the Amended Complaint.

50.

Mohawk admits only that Silver informed Plaintiff that his termination was due to the fact that he knowingly allowed illegal employees to work on his shift. Mohawk denies the remaining allegations contained in paragraph 50 of the Amended Complaint.

51.

Mohawk denies the allegations contained in paragraph 51 of the Amended Complaint.

52.

Mohawk denies the allegations contained in paragraph 52 of the Amended Complaint.

53.

Mohawk denies the allegations contained in paragraph 53 of the Amended Complaint.

54.

Mohawk denies the allegations contained in paragraph 54 of the Amended Complaint.

55.

Mohawk denies the allegations contained in paragraph 55 of the Amended Complaint.

56.

Mohawk denies the allegations contained in paragraph 56 of the Amended Complaint.

57.

Mohawk denies the allegations contained in paragraph 57 of the Amended Complaint.

58.

Mohawk denies the allegations contained in paragraph 58 of the Amended Complaint.

59.

Mohawk denies the allegations contained in paragraph 59 of the Amended Complaint.

60.

Mohawk denies the allegations contained in paragraph 60 of the Amended Complaint.

61.

The allegations in paragraph 61 describe information protected by the attorney-client privilege. In responding to these allegations, Mohawk does not waive its attorney-client privilege. Mohawk denies the allegations contained in paragraph 61 of the Amended Complaint.

62.

Mohawk denies the allegations contained in paragraph 62 of the Amended Complaint.

63.

Mohawk admits solely that an article regarding this lawsuit did appear in a local newspaper. Mohawk is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 63 of the Amended Complaint, and therefore denies such allegations.

64.

Mohawk denies the allegations contained in paragraph 64 of the Amended Complaint.

## *CLAIMS*

### *COUNT I*

65.

Mohawk incorporates its responses to paragraphs 1 through 64 of the Amended Complaint, as if fully set forth herein.

66.

Mohawk admits that Plaintiff accurately quotes from 42 U.S.C. § 1985(2), but Mohawk specifically denies that it has acted in violation of 42 U.S.C. § 1985(2).

67.

Mohawk admits that individuals injured by violations of 42 U.S.C. § 1985(2) can have a civil cause of action for damages against the individuals or entities that violated § 1985(2), but Mohawk specifically denies that it has acted in violation of 42 U.S.C. § 1985(2) or that Plaintiff has suffered any injury.

68.

Mohawk denies the allegations contained in paragraph 68 of the Amended Complaint.

69.

Mohawk denies the allegations contained in paragraph 69 of the Amended Complaint.

### *COUNT II*

70.

Mohawk incorporates its responses to paragraphs 1 through 69 of the Amended Complaint, as if fully set forth herein.

71.

Mohawk denies the allegations contained in Paragraph 71 of the Amended Complaint.

72.

Mohawk denies the allegations contained in paragraph 72 of the Amended Complaint.

73.

Mohawk denies the allegations contained in paragraph 73 of the Amended Complaint.

74.

Mohawk denies the allegations contained in paragraph 74 of the Amended Complaint.

75.

Mohawk denies the allegations contained in paragraph 75 of the Amended Complaint.

76.

Mohawk denies the allegations contained in paragraph 76 of the Amended Complaint.

77.

Mohawk admits that paragraph 77 accurately reflects the statutory language of O.C.G.A. § 16-10-93(a), but denies that Mohawk has acted in violation of that statute.

78.

Mohawk denies the allegations contained in paragraph 78 of the Amended Complaint.

79.

Mohawk denies the allegations contained in paragraph 79 of the Amended Complaint.

80.

Mohawk admits that paragraph 80 accurately reflects the statutory language of 18 U.S.C. § 1512(b), but denies that Mohawk has acted in violation of that statute.

81.

Mohawk denies the allegations contained in paragraph 81 of the Amended Complaint.

82.

Mohawk denies the allegations contained in paragraph 82 of the Amended Complaint.

83.

Mohawk admits that paragraph 83 accurately reflects the statutory language of 18 U.S.C. § 1512(d), but denies that Mohawk has acted in violation of that statute.

84.

Mohawk denies the allegations contained in paragraph 84 of the Amended Complaint.

85.

Mohawk denies the allegations contained in paragraph 85 of the Amended Complaint.

86.

Mohawk denies the allegations contained in paragraph 86 of the Amended Complaint.

87.

Mohawk denies the allegations contained in paragraph 87 of the Amended Complaint.

88.

Mohawk denies the allegations contained in paragraph 88 of the Amended Complaint.

89.

Mohawk denies the allegations contained in paragraph 89 of the Amended Complaint.

## *COUNT III*

90.

Mohawk incorporates its responses to paragraphs 1 through 89 of the Amended Complaint, as if fully set forth herein.

91.

Mohawk denies the allegations contained in paragraph 91 of the Amended Complaint.

## *COUNT IV*

92.

Mohawk incorporates its responses to paragraphs 1 through 91 of the Amended Complaint, as if fully set forth herein.

93.

The allegations in paragraph 93 do not make specific allegations against Mohawk, so no response is required. Mohawk nonetheless denies the allegations contained in paragraph 93 of the Amended Complaint.

94.

The allegations in paragraph 94 do not make specific allegations against Mohawk, so no response is required.

Mohawk nonetheless denies the allegations contained in paragraph 94 of the Amended Complaint.

95.

The allegations in paragraph 95 do not make specific allegations against Mohawk, so no response is required. Mohawk nonetheless denies the allegations contained in paragraph 95 of the Amended Complaint.

96.

The allegations in paragraph 96 do not make specific allegations against Mohawk, so no response is required. Mohawk nonetheless denies the allegations contained in paragraph 96 of the Amended Complaint.

97.

The allegations in paragraph 97 do not make specific allegations against Mohawk, so no response is required. Mohawk nonetheless denies the allegations contained in paragraph 97 of the Amended Complaint.

## *COUNT V*

98.

Mohawk incorporates its responses to paragraphs 1 through 97 of the Amended Complaint, as if fully set forth herein.

99.

Mohawk admits only that a person's effort to intimidate, threaten or deter another person from testifying or testifying truthfully or freely could be a violation of Georgia criminal law. By way of further answer, Mohawk denies that it took any actions in violation of Georgia criminal law and Mohawk denies the remaining allegations contained in paragraph 99 of the Amended Complaint.

100.

Mohawk denies the allegations contained in paragraph 100 of the Amended Complaint.

## *COUNT VI*

101.

Mohawk incorporates its responses to paragraphs 1 through 100 of the Amended Complaint, as if fully set forth herein.

102.

Mohawk denies the allegations contained in paragraph 102 of the Amended Complaint.

103.

Mohawk denies the allegations contained in paragraph 103 of the Amended Complaint.

## *COUNT VII*

104.

Mohawk incorporates its responses to paragraphs 1 through 103 of the Amended Complaint, as if fully set forth herein.

105.

Mohawk admits that paragraph 105 accurately reflects the statutory language of O.C.G.A. § 51-12-30, but denies Mohawk acted in violation of that statute or that the statute creates a cause of action.

106.

Mohawk denies the allegations contained in paragraph 106 of the Amended Complaint.

107.

Mohawk denies the allegations contained in paragraph 107 of the Amended Complaint.

## *PRAYER FOR RELIEF*

Mohawk denies that Plaintiff is entitled to any of the relief sought in the Prayer for Relief.

Except where expressly admitted, Mohawk denies each and every allegation contained in the Amended Complaint.

WHEREFORE, having fully answered, Mohawk prays that the Amended Complaint be dismissed with prejudice and with all costs cast upon Plaintiff.

This 18th day of May, 2007.

*/s/ Leigh R. Rhoads*
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# APPENDIX L — PLAINTIFF'S MOTION TO COMPEL RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES AND FIRST REQUESTS TO PRODUCE DOCUMENTS THAT DEFENDANT MOHAWK CLAIMS ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE, DATED AUGUST 29, 2007

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ROME DIVISION**

CIVIL ACTION
FILE NO. 4:07-CV-049-HLM

NORMAN CARPENTER,
Plaintiff

vs.

MOHAWK INDUSTRIES, INC.; PATRICIA SILVERS;
JEFFERY BRIGGS; SCOTT HIGGINS;
Defendants.

**ACTION UNDER**
**42 U.S.C. § 1985(2)**
**AND CLAIMS UNDER**
**GEORGIA LAW**

**JURY TRIAL DEMANDED**

## PLAINTIFF'S MOTION TO COMPEL RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES AND FIRST REQUESTS TO PRODUCE DOCUMENTS THAT DEFENDANT MOHAWK CLAIMS ARE PROTECTED BY THE ATTORNEY-CLIENT. PRIVILEGE

Pursuant to Fed. R. Civ. P. 37, Plaintiff files this Motion To Compel Defendant Mohawk Industries, Inc. ("Mohawk") to respond to Plaintiff's First Interrogatory Nos. 4 and to produce all documents responsive to Plaintiff's First Request For Production Request Nos. 4, 6, 7, 12, 13, 14, 15, 32, 33, 34.

The substance of the discovery requests and responses in question are quoted in full in Plaintiff's Brief in support of this Motion filed concurrently herewith.

Mohawk lodged objections and withheld information and/or documents to all of these discovery requests in dispute on the grounds of a purported attorney client privilege/work product doctrine. After a meet and confer effort by both parties, Mohawk insists that the communications in question are protected by an attorney-client privilege that it has not waived. Plaintiff in this Motion contends that any such privilege does not attach to the requested communications and that any such privilege has been waived in this action by Mohawk.

The bases for this Motion are set forth in the accompanying supporting Brief. As stated below, the counsel for the parties have engaged in substantial good faith efforts to resolve these discovery disputes and have reached an impasse that requires ruling by this Court.

This 29th day of August, 2007.

Respectfully submitted,

s/Thomas J. Munger
Georgia Bar No. 529609

s/Benjamin A. Stone
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*Appendix L*

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
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CIVIL ACTION
FILE NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

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**ACTION UNDER**
**42 U.S.C. § 1985(2)**
**AND CLAIMS UNDER**
**GEORGIA LAW**

**JURY TRIAL DEMANDED**

# PBRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES AND FIRST REQUESTS TO PRODUCE DOCUMENTS THAT DEFENDANT MOHAWK CLAIMS ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE

Plaintiff Carpenter respectfully moves this Court to compel Defendant Mohawk to produce information and documents that the parties agree are centrally important in this lawsuit but that Mohawk has withheld on a claim of attorney-client privilege.

Carpenter's counsel files this Motion only after a lengthy and detailed verbal and written "meet and confer" process with Mohawk's counsel. The parties are quite cognizant of the Court's statement that it does not want discovery disputes in this lawsuit to consume a disproportionate amount of the Court's scarce resources. However, Carpenter respectfully files this motion because: (1) the evidence that Mohawk is withholding is central to the issues before the Court; (2) Mohawk's claim that it can withhold this evidence on the grounds of privilege is incorrect as a matter of law based on Mohawk's own factual admissions and the applicable case law on privilege and waiver and (3) the "meet and confer" process engaged in professionally and in good faith by counsel for both sides did not resolve this important discovery dispute.

## STATEMENT OF FACTS

### A. *Carpenter's Claims In This Lawsuit*

Carpenter claims that Mohawk and others violated 42 U.S.C. § 1985(2) and Georgia law by seeking to deter Carpenter from testifying or testifying truthfully in the related case pending against Mohawk before this Court

—*Williams et al v. Mohawk.* In summary, Carpenter alleges as follows:

1. Because of the *Williams* lawsuit, Mohawk and its counsel conspired to cover up evidence reported or revealed by Mohawk employees that shows that Mohawk knowingly uses illegal "temporary workers" to work at Mohawk.

2. Carpenter was a Mohawk Shift Supervisor who sent an email to HR reporting that 90% of the temporary workers on his shift did not have proper documentation.

3. Mohawk tasked its outside counsel in *Williams* —Juan Morillo—to interrogate Carpenter without the presence of anyone else from Mohawk. During the course of this inquisition, because of *Williams*, Morillo made numerous statements and engaged in numerous acts that were designed to (and which did in fact) intimidate and implicitly threaten Carpenter with the goal of causing him to state that he was not sure that there were any illegal aliens on his Shift or, at a minimum, state that his 90% estimate was an exaggeration. Morillo did not achieve this intended goal.[1]

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[1] Carpenter does not here elaborate on the statements made at the Morillo interview because Mohawk now insists that these statements are somehow covered by the attorney-client privilege. However, when discovery on the communications at the interview and the related communications is permitted in this action, Carpenter will present specific evidence about Morillo's interview that, with related evidence, will establish his claims.

4. Subsequent events established that Mohawk learned that Morino had not succeeded in sufficiently intimidating Carpenter. Morillo, then Mohawk Corporate Compliance Head (and then General Counsel) Sal Perillo and two HR executives formed a team of four who were involved in the consequent decisions to: (a) terminate Carpenter for his refusal to retract his report and knowledge and render himself immaterial in *Williams;* and (b) inform Carpenter he was fired for engaging in criminal conduct—ironically harboring the illegal aliens he reported on—so that he would be chilled from raising his knowledge to class counsel in *Williams* and/or testifying truthfully about his knowledge in *Williams.*

5. Thus, on the very day after the Morillo interrogation, Mohawk told Carpenter he was fired at the request of the lawyers (Morillo and Perillo) and that he was fired for alleged conduct that is deemed to be criminal under federal law.

### B. *Mohawk's Factual Allegations In This Case*

In its successful bid to avoid expedited discovery on Carpenter's allegations in *Williams*, Mohawk asserted to the Court that Carpenter's allegations about the communications and actions of Morillo and the others involved in these actions are "ludicrous" "lurid", "wild", "ridiculous" and "fantasy." (*See* Mohawk's Opposition To Plaintiffs' Emergency Motion For An Evidentiary Hearing—filed on March 30, 2007 as Docket No. 94 in

*Williams* and hereinafter "Mohawk's Hearing Opposition"—, pp. 2, 4, 8). In making these assertions, Mohawk laid out factual representations that it described as the "true facts" surrounding its "investigation" and termination of Carpenter. (Mohawk's Hearing Opposition, p. 4)

1. On November 22, 2006, Carpenter and Mohawk HR employee Becky Hale began an email exchange about a former temporary worker named Tania Perez, triggered by Carpenter's request that Perez be retained through the temporary service that Mohawk used to retain her in the past. (Mohawk's Hearing Opposition, p: 5; Exh. A at 1-2).

2. After completing the exchange that referenced Perez and her work status, Carpenter sent Hale an e-mail stating:

> Becky, 90% of the people that come through the temp do not have good papers thats (sic) why they come to us that way I can tell you that most of the people working here today here through a temp do not have one of the two things either a GA I.d. or good papers through the I.N.S. Thanks, Norman.

(Mohawk's Hearing Opposition, p. 6; Exh. A at p. 1).

3. Hale forwarded Carpenter's 90% email to Mohawk Human Resources manager Kirk Prather stating: "Would you like to advise Norman?" (Mohawk's

Hearing Opposition, Exh. A at p. 2). Prather forwarded the e-mails to Mohawk's Human Resources Regional Head Patricia Silver stating, "Please see the message string below. I will call you this afternoon to discuss before I speak with Norman." *Id.*

4. Instead of "advising" Carpenter of anything as Hale requested, Mohawk represented to the Court that it instead "commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law" and that "[a]s a part of that investigation; Mohawk's outside counsel Juan P. Morillo [trial counsel for Mohawk in *Williams*] interviewed Mr. Carpenter." (Mohawk's Hearing Opposition, p. 6).

5. Mohawk firmly represented to the Court that its use of Morillo with respect to Carpenter had *nothing* to do with his role as Mohawk's legal counsel in *Williams* but was instead a purely HR factual investigation role to "investigate employee misconduct or violation of [Mohawk's] compliance and other policies"—in particular Carpenter's alleged unlawful and unethical conduct regarding his emails to Hale about Perez. (Mohawk's Hearing Opposition, pp. 10). Mohawk could not have been more clear to the Court on this point: "***Mohawk and its counsel communicated with Mr. Carpenter in relation to an internal investigation of alleged misconduct by Mr. Carpenter - not about this [Williams] litigation.***" *Id.* (emphasis added).

6. Following this "internal" HR investigation, four individuals—Morino, Silver, Mohawk's Perillo, and HR

Vice President Jerry Melton—considered the results of the investigation (most notably including and likely only including Morillo's "internal investigation" interview with Carpenter). *(See* Mohawk's Response To Plaintiff's First Interrogatory No. 4—quoted in full below).

7. According to Mohawk, the same four individuals were the only persons involved in the decision to terminate Carpenter because Mohawk now contends that Carpenter's initial email request to Hale asking to have Hale retain Perez amounted to an "attempt to have Mohawk send a worker [Perez] that Mr. Carpenter believed to be unauthorized to a temporary agency" and that this "attempt" amounted to "a clear violation of Mohawk's Code of Ethics and an attempt to circumvent federal immigration law. *See* 8 U.S.C. 1324a(a)(1)(A) [a statute with criminal sanctions]. (*Id.*; Mohawk's Hearing Opposition, pp. 6-7). Said another way,. Mohawk claims it concluded that Carpenter's conduct was an "attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker." (*Id.*, pp. 6-7).

8. This termination decision was effectuated on December 5, 2006—the very day after the Morillo "interview" when Silver met Carpenter and informed him his employment was terminated. (Mohawk Answer, 48, 49).[2]

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[2] While not necessary for this motion,Carpenter alleges that Silver told him, "As you know, you have talked to our outside attorney" and then stated it was Mohawk's attorneys who told her that she had to terminate Carpenter. (Amended Complaint, § 49).

## C. *The Discovery Requests At Issue*

Having reviewed Mohawk's "true facts" factual assertions to the Court that he was terminated because of Morillo's factual investigation of him, Carpenter recognized that he needed discovery on the facts surrounding this investigation and the communications regarding it that it led to his termination. Thus, Carpenter served discovery requests designed to uncover baseline information including: the identity and roles of the persons involved in the investigation and termination of Carpenter's purported wrongdoing, the communications between such persons, and all documents relating to the investigation and termination, including Marillo's interview of Carpenter and Martinez.[3]

Mohawk argued to this Court in. *Williams* that "the place for testing" Carpenter's allegations was in

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[3] Carpenter recognizes that this evidence will undermine Mohawk's internally inconsistent "true facts." Mohawk contends that Silver told Carpenter that "his termination was due to the fact that he knowingly allowed illegal employees to work on his shift." (Answer, ¶ 50). But it is undisputed that it was HR and not Carpenter who retained the illegal workers on his shift - it was Carpenter who *disclosed* that fact to Mohawk in his email and drew the wrath of Mohawk for doing so. (*See* Mohawk Answer, ¶¶ 23 and 50). In its Hearing Opposition Brief, Mohawk posited a new explanation and claimed that it terminated Carpenter not for knowingly harboring illegal aliens on his shift but instead for attempting to have Hale retain the illegal Perez. But it is again undisputed that it was Carpenter who freely informed Hale that Perez told him she did not have proper paperwork.

*Carpenter* and not *Williams.* (Mohawk Hearing Opposition, p. 3). However, faced with this basic discovery in *Carpenter*, Mohawk decided it was actually not a good idea to test Carpenter's allegations and Mohawk's on-the-record factual rebuttal of them in this case. Thus, after engaging in strenuous allegations that Carpenter had filed a "ridiculous" "strike suit" of "fantasy" allegations, and after presenting to the Court a detailed, crafted representation of the "true facts" about Morillo's involvement in the alleged actions, Mohawk has now sought to essentially bar discovery by Carpenter in this case on the grounds of attorney-client privilege.

As indicated below, Mohawk has asserted that all communications by Morillo and Perillo are privileged in this action—including Morillo's interviews of Carpenter and Martinez, Morillo's reports to Corporate Compliance (Perillo) and HR (Silver and Melton) about his *admittedly* non-litigation HR/Corporate Compliance factual investigation, and the communications leading to the decision to terminate Carpenter and accuse him of a crime in doing so.

The specific discovery requests that were served by Carpenter—and that were objected to by Mohawk on privilege grounds—include the following:

***INTERROGATORY NO. 1***

> Identify all individuals by name and job title who were involved in the decision to request that Carpenter be interviewed by Juan

Morillo, Esq. ("Morillo"). "Involved" is defined as any individual who made the decision (whether or not jointly with one or more individuals), was conferred with in connection with the decision, reviewed the decision before it was implemented, or was informed of the decision before it was implemented.

### *MOHAWK'S RESPONSE TO INTERROGATORY NO. 1*

Mohawk objects to this interrogatory as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk responds as follows: Sal Perillo, former General Counsel to Mohawk.

### *INTERROGATORY NO. 3*

Identify all individuals by name and job title who were involved in the decision to terminate Carpenter's employment with Mohawk. "Involved" is defined as any individual who made the decision (whether or not jointly with one or more individuals), was conferred with in connection with the decision, reviewed the decision before it was implemented, or was informed of the decision before it was implemented.

### *MOHAWK'S RESPONSE TO INTERROGATORY NO. 3*

Mohawk objects to this interrogatory as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk responds as follows: Sal Perillo, Jerry Melton, Patti Silver and Juan Morillo.

[Mohawk claims that, because of the privilege it need not further address the roles of the four named individuals in these events and decisions.]

### *INTERROGATORY NO. 4*

For each such person identified in Mohawk's response to Interrogatory No. 3, identify the specific role that person played in the decision referenced in Interrogatory No. 3.

### *MOHAWK'S RESPONSE TO INTERROGATORY NO. 4*

Mohawk incorporates its response to Interrogatory No. 1.

Carpenter also served a set of Requests for Production of Documents that sought all documents related to Mohawk's decisions and actions challenged by Carpenter. Mohawk did not object on the grounds of relevance or burdensomeness on these Requests, but Mohawk either objected to these Request on the grounds of privilege or stated it would only produce some of responsive documents and withhold others due to the privilege:

> ***DOCUMENT REQUEST NO. 4***
>
> All documents that constitute, reflect, reference or relate to Mohawk's decision to request that Carpenter be interviewed by Juan Morillo, Esq. ("Morillo").
>
> ***MOHAWK'S RESPONSE TO DOCUMENT REQUEST NO. 4***
>
> Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine.
>
> ***DOCUMENT REQUEST NO. 6***
>
> All documents constituting, reflecting or relating to any communications from Morillo regarding his planned meeting or meeting with Carpenter.

### *MOHAWK'S RESPONSE TO REQUEST NO. 6*

Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine.

### *DOCUMENT REQUEST NO. 7*

All documents that reference Morillo's meeting with Carpenter.

### *MOHAWK'S RESPONSE TO REQUEST NO. 7*

Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, and subject to the entry of a Protective Order.

### *DOCUMENT REQUEST NO. 12*

All notes taken during Morillo's meeting with Martinez.

### *MOHAWK'S RESPONSE TO REQUEST NO. 12*

Mohawk objects to this request as it seeks information protected by the attorney client privilege and the attorney work product doctrine.

### *DOCUMENT REQUEST NO. 13*

All documents that reference in any way Carpenter's email to Becky Hale ("Hale") sent on November 28, 2006 as identified in Paragraph 28 of Plaintiff's First Amended Complaint.

### *MOHAWK'S RESPONSE TO REQUEST NO. 13*

Mohawk objects to this request as it seeks information protected by the attorney-client privilege. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

### *DOCUMENT REQUEST NO. 14*

All documents that constitute, reflect, reference, support or relate to Mohawk's decision to terminate Carpenter's employment.

### *MOHAWK'S RESPONSE TO REQUEST NO. 14*

Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

### *DOCUMENT REQUEST NO. 15*

All documents constituting, reflecting or relating to any communications regarding Mohawk's decision to terminate Carpenter's employment.

### *MOHAWK'S RESPONSE TO REQUEST NO. 15*

Mohawk objects to this request as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, to the extent any exist, subject to the entry of a Protective Order.

## *DOCUMENT REQUEST NO. 32*

All documents that Mohawk claims support its conclusion(s) that formed the basis or bases for its decision to terminate Carpenter's employment.

## *MOHAWK'S RESPONSE TO REQUEST NO. 32*

Subject to and without waiving this or the General Objections, Mohawk will produce non-privileged documents responsive to this request, subject to the entry of a Protective Order.

## *DOCUMENT REQUEST NO. 33*

All communications between a member of Mohawk's Legal Department and Morino that reference Carpenter.

## *MOHAWK'S RESPONSE TO REQUEST NO. 33*

Mohawk objects to this request as it seeks information protected by the attorney-client privilege.

### *DOCUMENT REQUEST NO. 34*

> All communications between a member of Mohawk's Human Resources Department and Morillo that reference Carpenter.

### *MOHAWK'S RESPONSE TO REQUEST NO. 34*

> Mohawk objects to this request as it seeks information protected by the attorney-client privilege.

Carpenter requested and Mohawk produced a privilege log. That Log (which is attached hereto as Exhibit "A") stated that Mohawk was withholding four documents on the grounds of its objections above.

The Log indicates that the allegedly privileged documents were written by Morillo (along with one other writer). (Exhibit "A"). However, the specific descriptions of two of these memos (one written the day after Carpenter's termination) are far too general to identify any of them as privileged as they are described simply as "Memorandum from outside counsel to client concerning Union Grove facility." *Id.* The other two documents are described as memos concerning the interviews of Carpenter and Martinez. *Id.*

Thus, Mohawk has produced *no* document relating to or referencing Morillo's interview of Carpenter or even the purported reasons for its termination of

Mohawk.[4] Mohawk instead contends that all such documents and all communications relating to those central issues in this lawsuit are protected by the privilege.

### D. *The Meet And Confer Efforts By Counsel For The Parties*

After receiving Mohawk's responses to Carpenter's discovery requests, Carpenter's counsel and Mohawk's counsel exchanged substantive letters regarding their positions on the objections at issue. Copies of the letters addressing the privilege issue are attached hereto as Exhibit "B." However, after a good faith and significant effort by counsel for both sides, the parties agreed that they had reached an impasse on Mohawk's privilege objections. Accordingly, the parties in good faith agreed that was necessary for the Court to address these disputes on motion.

## ARGUMENT AND CITATION OF AUTHORITY

### A. Mohawk Cannot Establish That The Evidence It Has Withheld Is Covered By The Attorney-Client Privileged.

"The attorney-client privilege exists to protect confidential communications between client and lawyer made for the purpose of securing legal advice."

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[4] Moreover, it is undisputed that Morillo's assistant took notes of the Morillo-Carpenter interview, and Mohawk has failed to include this document on the privileged log.

*In re Grand Jury Proceedings 88-89*, 899 F.2d 1039, 1042 (11th Cir. 1990); *Adler v. Wallace Computer Services, Inc.*, 202 F.R.D. 666 674 (N.D. Ga. 2004). The privilege protects confidential communications from an attorney to a client only if the attorney's communications would reveal confidential client communications. *BellSouth Advertising & Publishing Corp.*, 1992 U.S. Dist. 17679 * 22 (N.D. Ga. 1992).

Importantly, "the [attorney-client] privilege is construed narrowly . . ." *Go Medical Industries PTY, LTD*, 1995 U.S. Dist. LEXIS 22248 *6 (N.D. Ga. 1995). And it is the party claiming the privilege who "bears the burden of proving the existence of the privilege." *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987); *Adler*, 202 F.R.D. at 674.

The party claiming the privilege must therefore establish each of the following four elements: "(1) the holder of the privilege is a client; (2) the person to whom the communication was made was a member of the bar and that person is acting as a lawyer in connection with the communication; (3) the communication relates to a fact of which the attorney was informed by the client without the presence of strangers for the purpose of securing legal advice; and (4) the privilege is claimed and not waived by the client." *In re Grand Jury Proceedings 88-89*, 899 F.2d at 1042; *Adler*, 202 F.R.D. at 674.

Like an individual, a corporation can invoke the attorney client privilege. *Upjohn v. United States*, 449

U.S. 383 (1981). In describing such a privilege, this Court in *Burlington Industries, Inc. v. Yarn, Inc.*, 1997 U.S. Dist. LEXIS 10347 *12 (N. D. Ga. 1997)(J. Murphy) stated, "*Upjohn* allows a corporation to invoke the attorney-client privilege when the information-giver is an 'employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services.'" *Id.* at * 12 *(quoting* Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 487).

Under the well-established standards set forth above, Mohawk has not carried its burden of demonstrating that any of the information or documents that it has refused to produce in this matter is covered by the attorney-client privilege.

As a threshold matter, when Mohawk initially asserted the privilege in this matter, it did not produce *any* information about these communications that would establish that they were privileged. Pursuant to Fed. R. Civ. P. 26(b)(5), Carpenter requested that Mohawk provide a privilege log but the privilege log provided did nothing to establish the existence of a privilege. Indeed; the Log stated only that there were documents —prepared by Morillo—concerning the "Union Grove facility" and his "interview" of Carpenter and co-worker Christina Martinez. Carpenter has requested a revised log—and any additional information from Mohawk that would substantiate a claim of privilege—but Mohawk has produced nothinig and as a result cannot demonstrate the existence of a protectable privilege. *See Williams v. Taser Int'l Inc.*, 2007 U.S. Dist. LEXIS 40280 * 11-12 (N.D. Ga. 2007)(privilege log too general to establish the existence of a privilege).

Even if Mohawk's privilege Log suggested the existence of a privilege here - the *undisputed* facts demonstrate that the communications and information being withheld by Mohawk would not be privileged as Mohawk fully admits that Morillo was not acting as a lawyer in connection to these interviews - but instead was carrying out the company's HR/Corporate Compliance task of investigating Carpenter for purported misconduct—in order to determine whether to discipline or discharge Mr. Carpenter. Once again, Mohawk adamantly told this Court: "***Mohawk and its counsel communicated with Mr. Carpenter in relation to an internal investigation of alleged misconduct by Mr. Carpenter—not about this [Williams] litigation***."

To state the obvious, an employer cannot seek to cloak its investigative steps and facts it relied upon to terminate an employee by simply inserting a lawyer into the process. When Morillo acted as Mohawk's Human Resources/Corporate Compliance Department in investigating purported wrongdoing by Carpenter, and then communicated his factual finding as part of (or wholly as) the reasons for Mohawk's decision whether to discipline or terminate Mr. Carpenter, he was acting as a Human Resources employee of Mohawk in carrying out a business task. Mohawk admits that his actions were not about *Williams.* Mohawk's *pro hac vice* role as a lawyer in Georgia is, of course, limited to *Williams.* If Morillo was acting as a lawyer in his investigative interview of Carpenter, he was practicing law in Georgia without a license. That of course cannot be.

A lawyer conducting an employer investigation into an employee who then provides facts to the employer that the employer relies upon to terminate the employee and to defend the termination in litigation is not acting as a lawyer. If it were otherwise, an employer could always use lawyers to gather the facts for a termination and simply refuse discovery on those facts in suits where the terminations are challenged by claiming the privilege. "Attorney-client communications concerning business matters are not within the attorney-client privilege." *BellSouth Advertising. & Publishing Corp. v. American Business. Lists, Inc.*, 1992 U.S. Dist. 17679 * 22 (N.D. Ga. 1992).

Moreover, Mohawk cannot claim a privilege on these communications under *Upjohn* because it cannot logically claim that Carpenter—as a six month front line supervisor—had "a significant relationship to the corporation" or that Carpenter had a "significant relationship" to the Mohawk's involvement in *Williams. Burlington Industries, Inc. v. Yarn, Inc.*, 1997 U.S. Dist. LEXIS 10347 * 12 (N. D. Ga. 1997) (J. Murphy). Indeed, Mohawk again asserts that these communications had nothing to do with *Williams* and were instead part of an unrelated HR investigation of Carpenter — nothing that could be covered by *Upjohn.*

### B. Even If The Information Withheld By Mohawk Is Privileged, Mohawk Has Repeatedly Waived The Privilege.

"While the [attorney-client] privilege is construed narrowly, waiver of the privilege is applied broadly." *Medical Industries PTY, LTD*, 1995 U.S. Dist. LEXIS 22248 *6 (N.D. Ga. 1995 ). "The attorney-client privilege might be waived: (1) when a client testifies concerning portions of the attorney-client communication; (2) when a client places the attorney-client relationship directly in issues and (3) when a client asserts reliance on attorney advice as an element of the defense." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1418 (11th Cir. 1994).

Parties can waive the privilege expressly or by implication. "[A]ny voluntary disclosure by the holder of such privilege is inconsistent with the confidential relationship and thus waives the privilege." *Sperling v. City of Kennesaw Police Dept.*, 202 F.R.D. 325, 328 (N.D. Ga. 2001). "A defendant may not use the privilege to prejudice his opponents' case or to disclose some selected communications for self-serving purposes." *Cox v. Administrator U.S. Steele & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994). Such "selective disclosure for tactical purposes waives the privilege." *Id.*

A client may also waive the privilege by implication as the privilege "was intended as a shield, not a sword." *Cox v. Adm'r U.S. Steel & Carnegie*, 1 7 F. 3d 1386, 1417 (11th Cir. 1994). Thus, "when a party defends its actions by disclosing an attorney-client communication, it waives the attorney-client privilege as to all such communications regarding the same subject matter." *Outside The Box Innovations, LLC v. Travel Caddy, Inc.*, 455 F. Supp. 2d 1374, 1376 (N.D. Ga. 2006).

A party also waives its privilege if it injects into the case an issue that requires an examination of otherwise protected information. *Cox*, 17 F.3d at 1417. This implicit waiver doctrine "reflects the position that the attorney-client privilege 'was intended as a shield, not a sword.'" *Id.*

Importantly, it is not necessary that a party raise an affirmative defense relying on privileged information in order to waive the privilege. *Id.* Any injection of the factual issues covered by the privilege waives the privilege. *Id.*[5] And, where a party has waived the privilege, the "waiver extends to all other communications relating to the same subject matter." *Bell South Advertising & Publishing Corp. v. American Business Lists, Inc.*, 1992 U.S. Dist. LEXIS 17679 * 22, 24 (N.D. Ga. 1992).

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[5] Thus, Mohawk need not have disclosed the specific statements of the Morillo HR investigative interview to have waived the privilege—it need only "inject" the interview as it has here by claiming that Morillo's interview was "part of the investigation" that caused Carpenter's termination for unlawful conduct—"true facts" that Mohawk has already offensively asserted with "as a sword" to this Court.

Mohawk's actions here (including its description of the "true facts" to this Court) can fairly be described in a variety of different ways. They can be described as Mohawk "inject[ing]" the facts surrounding the interview into this case. *See Cox*, 17 F.3d at 1417. They can be described as Mohawk "defending its actions" by disclosing information that it now contends is privileged. *See Travel Caddy*, 455 F. Supp. 2d at 376. Or they can simply be described as Mohawk attempting to "use the privilege to prejudice [its] opponent's case [and] disclose some selected communications for self-serving purposes." *Cox*, 17 F.3d at 1417. No matter how the Court chooses to characterize Mohawk's actions here, however, the end result is the same: a finding that Mohawk has both expressly and impliedly waived any privilege that it now tries to assert.

In essence, Mohawk seeks one-way discovery in this case. It wishes to be able to rely on the Morillo-led alleged "wrongdoing" investigation to justify Mohawk's actions without disclosing Morillo's actions and communications in those actions. It wishes to be able to cross-examine Carpenter and Morillo but avoid depositions of the only two people Mohawk claims were involved in two of the challenged actions—the Morillo interview and the termination decision. While Mohawk claims in its Log that it created only four documents about these events, it wishes to withhold every one of them. This is a classic case of a party using the privilege as a sword and then as a shield.[6]

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[6] Mohawk also waived the privilege when Silver admittedly told Carpenter that he was terminated "due to the

(Cont'd)

Notably, on facts very similar to those at issue here, the District Court in *Rivera v. Kmart Corp.*, 190 F.R.D. 298 (D.P.R. 2000) recognized a waiver. In *Rivera*, the plaintiff (Rivera) and a group of other managers were terminated from their employment by K-Mart—purportedly because of an investigation by Kmart into allegations that the terminated employees had destroyed merchandise in connection with insurance claims after a hurricane. Rivera and the others terminated filed an action (including, it appears, claims under § 1985) contending that they were terminated not because they destroyed merchandise but instead because they had testified to authorities that they had been instructed by their superiors to destroy the merchandise.

In connection with the case, the plaintiffs alleged that there were a number of other managers (including a manager named Gonzalez) who had also destroyed merchandise—but who had not been terminated because they had not given damaging testimony to authorities. K-Mart, however, filed an affidavit with the court stating that it had interviewed other managers (including Gonzalez) and had been unable to confirm any other destruction of merchandise.

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(Cont'd)
fact that he knowingly allowed illegal employees to work on his shift" (Answer, ¶ 50), because it admitted that this purported finding was based at least in part on Morillo's role in the investigation that Mohawk admits was unrelated to Morillo's role as Mohawk's counsel.

In response to K-Mart's filing, the plaintiffs understandably sought the documents (including memos) prepared by K-Mart surrounding this investigation. K-Mart, like Mohawk here, refused to produce these memos and documents on the grounds that they were protected by the attorney-client privilege. The Court, however, did not hesitate in finding that K-Mart had implicitly waived the privilege:

> If Kmart is relying on the fact that Kmart investigators interviewed Elvin Gonzalez to support, at least in part, its position that no other wrongdoing . . . has been confirmed by Kmart, the contents of the interview are essential to determine whether or not Kmart's position is tenable. Defendant alleges that what dictated its decision to fire Plaintiffs was their involvement in the destruction of merchandise to be included in an insurance claim. Plaintiffs counter that what drove Kmart's decision to terminate them was their testimony to authorities that they received instructions from their supervisors to damage merchandise to include in the insurance claim. Therefore, Defendant's claim requires examination of those communications that would add or subtract credence from their position.
>
> Although the Court is not weighing its probative value, after reviewing the document which Kmart claims to be privilege . . . the

> Court finds that its contents are directly relevant and central to the issue of Kmart's reasons for dismissing its employees . . . In view of its relevance and connection with Kmart's allegations pertaining to the process of terminating its employees, the Court concludes that Kmart used the contents of the interview as a sword, albeit a dull one, to support its position and at the same time has attempted to cloak itself with the attorney-client privilege.

*Id.* at * 18-19.

Respectfully, this Court should reach the same result. Mohawk's argument that it must actually disclose the contents of the Morillo interview to waive the privilege is rejected by *Rivera*. Mohawk has attempted to use the purpose, nature, and results of Morillo's interview and the investigation that he centered to support its "true facts" to seek to persuade the Court that Carpenter's allegations are "ridiculous." Yet Mohawk seeks to allow only the "true facts" of the brandishing of its sword. Mohawk protested too much to the Court. It knows that discovery will establish that there is nothing "ridiculous" about Carpenter's allegations. Even if Mohawk could establish an attorney-client privilege here, it has been waived and Carpenter's Motion to Compel should be granted.

Respectfully submitted,

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# APPENDIX M — DEFENDANT MOHAWK INDUSTRIES, INC.'S MOTION FOR PROTECTIVE ORDER, DATED AUGUST 29, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC., PATRICIA SILVERS, JEFFERY BRIGGS, SCOTT HIGGINS,

Defendant.

## DEFENDANT MOHAWK INDUSTRIES, INC.'S MOTION FOR PROTECTIVE ORDER

Pursuant to Federal Rule of Civil Procedure 26(c), Defendant Mohawk Industries, Inc. ("Mohawk") hereby moves the Court for a Protective Order related to the upcoming depositions of Plaintiff Norman Carpenter and non-party Christina Martinez. For the reasons set forth in the accompanying Brief in Support, the Court should issue a Protective Order that, in part, establishes the following parameters for these depositions:

1. That by asking questions of Mr. Carpenter and Ms. Martinez about their communications with Mohawk's outside counsel, Mohawk will not be deemed to have waived the attorney-client privilege. Mohawk would reserve the right to assert the privilege in the future, and Plaintiff would reserve the right to argue that the privilege had been waived based on prior acts of Mohawk; and

2. That the attendance at these depositions be limited to the witnesses testifying and counsel for the parties in this case, with the parties then afforded the opportunity to designate the depositions, or portions thereof, under the terms of a Protective Order.

The parties have conferred in good faith to resolve the issues contained in this discovery Motion, but were unable to reach an agreement. See the attached Certificate of Good Faith Conferral attached as Exhibit A to this Motion. For the Court's convenience, a Proposed Protective Order is attached as Exhibit B.

Respectfully submitted, this 29th day of August, 2007.

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# APPENDIX N — *WILLIAMS* PLAINTIFFS' MOTION FOR LEAVE TO FILE OPPOSITION TO MOHAWK INDUSTRIES, INC.'S MOTION FOR PROTECTIVE ORDER, DATED SEPTEMBER 7, 2007

## IN THE UNITED STATES DISTRICT COURT
## FOR THE NORTHERN DISTRICT OF GEORGIA
## ROME DIVISION

Civil Action
File No. 4:04-cv-03-HLM

CLASS ACTION

SHIRLEY WILLIAMS, GALE PELFREY,
BONNIE JONES and LORA SISSON
individually and on behalf of a class

Plaintiffs,

vs.

MOHAWK INDUSTRIES, INC.

Defendant.

*Appendix N*

Civil Action
File No. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC.,
PATRICIA SILVER, JEFFERY BRIGGS
and SCOTT HIGGINS,

Defendants.

## *WILLIAMS* PLAINTIFFS MOTION FOR LEAVE TO FILE AN OPPOSITION TO MOHAWK INDUSTRIES, INC.'S MOTION FOR PROTECTIVE ORDER

Plaintiffs in *Williams v. Mohawk Industries, Inc.* respectfully move the Court for leave to file an Opposition to the Motion for Protective Order Mohawk filed in *Carpenter v. Mohawk Industries, Inc.* on August 29, 2007. [*Carpenter* Dkt. No. 32]. This Court previously directed the *Williams* plaintiffs to conduct discovery into Norman Carpenter's allegations that (1) Mohawk and its outside counsel had attempted to prevent him from testifying truthfully in the *Williams* case and (2) Mohawk fired Mr. Carpenter when he refused to recant his November 2006 report that 90 percent of the temporary workers on his Mohawk shift did not have proper work authorization documents. *See* Order at 30-31 (Apr. 9, 2007) [*Williams* Dkt No. 106]. Despite this direction, Mohawk has moved for a protective order that would prevent the *Williams* plaintiffs from attending and participating in the depositions of Mr. Carpenter and at least one additional witness, Christina Martinez.

Since the Court's April 9, 2007 Order allowing the *Williams* plaintiffs to conduct this discovery either in this case or in conjunction with discovery in *Carpenter*, the *Williams* plaintiffs have been attempting to coordinate depositions with the *Carpenter* parties so that the relevant witnesses—including Mohawk's employees—would only need to be deposed once.[1] Mr. Carpenter's counsel quickly agreed because that approach would save all parties and their counsel time and expense. After ignoring the *Williams* plaintiffs' requests for nearly two months, however, Mohawk first objected to coordinated depositions on August 22, 2007.[2] Although the *Williams* plaintiffs asked Mohawk's counsel for an opportunity to discuss the matter further,[3] Mohawk ignored that request.

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[1] *See, e.g.*, Letter from Ronan P. Doherty to Benjamin Stone and Randall Allen (July 3, 2007), attached hereto as Exhibit A; Letter from Ronan P. Doherty to Randall Allen and Daniel Diffley (Aug. 7, 2007), attached hereto as Exhibit B.

[2] *See* E-mail from Randall L. Allen to Ronan P. Doherty (Aug. 22, 2007), attached hereto as Exhibit C-2.

[3] *See* E-mail from Ronan P. Doherty to Randall L. Allen (Aug. 22, 2007), attached hereto as Exhibit C-1.

Instead, and without any notice to the *Williams* plaintiffs, Mohawk moved this Court for a Protective Order that would preclude the *Williams* plaintiffs from attending the Carpenter and Martinez depositions and further seal the transcripts so that the *Williams* plaintiffs could not discover the substance of the witnesses' testimony. Despite the obvious intent of the Motion, Mohawk's filing makes no mention of the *Williams* case or the *Williams* plaintiffs' substantial interest in this matter. Indeed, while Mohawk certifies that it has conferred in good faith with counsel for Carpenter, its filing makes no mention of its discussions with the *Williams* plaintiffs on these very same depositions.

Moreover, and despite the parties' prior efforts to coordinate this discovery, Mohawk did not serve the *Williams* plaintiffs with their Motion or otherwise inform them that it had been filed. As a result, the *Williams* plaintiffs only discovered Mohawk's Motion after a routine check of the *Carpenter* docket on September 5, 2007.

The *Williams* plaintiffs and their counsel have been extremely mindful of this Court's prior directions to work with opposing counsel and to exercise professional judgment before bringing discovery disputes to the Court. In this instance, however, plaintiffs' efforts to confer with Mohawk have been ignored. Even after discovering Mohawk's motion, plaintiffs' counsel again wrote to Mohawk's counsel to inquire whether Mohawk would agree to discuss this matter further. At the time of this filing, Mohawk had again failed to respond.

This Court has already recognized that the *Williams* plaintiffs have a significant interest in determining the truth of Mr. Carpenter's allegations. If those allegations are true, Mohawk has engaged in serious misconduct designed to intimidate witnesses in the *Williams* case. Mohawk's Motion for Protective Order asks the Court to reconsider its ruling that the *Williams* plaintiffs conduct discovery into this matter. The Motion further reveals that Mohawk intends to use unfounded privilege claims to prevent the *Williams* plaintiffs from ever finding out exactly what happened when Mohawk's litigation counsel in *Williams* took Mr. Carpenter into a closed room to address his report that a large number of Mohawk's temporary workers were not authorized to work in the United States. Under the circumstances, the *Williams* plaintiffs ask to be heard on this matter before the Court rules on Mohawk's Motion.

Accordingly, the *Williams* plaintiffs ask the Court's permission to oppose Mohawk's Motion on or before September 14, 2007. Because that deadline is well within the time remaining on the briefing schedule for Mohawk's Motion, the *Williams* plaintiffs' request should not delay the Court's resolution of Mohawk's Motion and will inflict no unfair prejudice on any of the *Carpenter* parties. For the Court's convenience, a Proposed Order granting this relief is attached hereto as Exhibit D.

This 7th day of September, 2007.

Respectfully submitted,

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# APPENDIX O — ORDER ON *WILLIAMS* PLAINTIFFS' MOTION FOR LEAVE TO FILE OPPOSITION TO MOHAWK INDUSTRIES, INC.'S MOTION FOR PROTECTIVE ORDER, FILED SEPTEMBER 10, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION FILE
NO. 4:07-CV-0049-HLM

NORMAN CARPENTER,

Plaintiff,

v.

MOHAWK INDUSTRIES, INC., PATRICIA
SILVERS, JEFFREY BRIGGS,
and SCOTT HIGGINS,

Defendants.

## ORDER

This case is before the Court on the Motion for Leave to File Opposition to Mohawk Industries, Inc.'s Motion for Protective Order filed by movants Shirley Williams, Gale Pelfrey, Bonnie Jones, and Lora Sisson (the "*Williams* plaintiffs") [34].

The *Williams* plaintiffs have requested permission to file a response to Defendant's Motion for Protective Order in this case. The Court finds that it is appropriate for the *Williams* plaintiffs to have an opportunity to respond to the Motion. The Court therefore **GRANTS** the Motion for Leave to File Opposition to Mohawk Industries, Inc.'s Motion for Protective Order [34] filed by the *Williams* plaintiffs, and **DIRECTS** the *Williams* plaintiffs to file their response by September 14, 2007. Defendant may respond to any such response filed by the *Williams* plaintiffs within ten days after its filing.

IT IS SO ORDERED, this the 10th day of September, 2007.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

# APPENDIX P — EXHIBIT A TO *WILLIAMS* PLAINTIFFS' OPPOSITION TO MOTION FOR PROTECTIVE ORDER, DATED SEPTEMBER 14, 2007 (DEFENDANT MOHAWK INDUSTRIES, INC.'S OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR AN EVIDENTIARY HEARING REGARDING MOHAWK'S CONTACT WITH WITNESSES, FILED IN *WILLIAMS V. MOHAWK INDUSTRIES, INC.*, N.D. GA., NO. 4:04-CV-03-HLM)

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ROME DIVISION**

Case No. 4:04-cv-03-HLM

CLASS ACTION

SHIRLEY WILLIAMS, GALE PELFREY,
BONNIE JONES and LORA SISSON,
individually and on behalf of a class,
Plaintiffs,

vs.

MOHAWK INDUSTRIES, INC.,
Defendant.

## DEFENDANT MOHAWK INDUSTRIES, INC.'S OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR AN EVIDENTIARY HEARING REGARDING MOHAWK'S CONTACT WITH WITNESSES[1]

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[1] Undersigned counsel do not represent Mohawk in *Carpenter v. Mohawk Industries* or the individual defendants in that action. Those defendants are filing a separate opposition addressing the impact of Plaintiffs' Motion on the *Carpenter* litigation.

In their "Emergency Motion for an Evidentiary Hearing Regarding Mohawk's Contact With Witnesses" ("Motion"), Plaintiffs ask this Court to conduct an immediate full-blown hearing on a single person's unsworn and unverified allegation of inappropriate conduct by counsel for Mohawk Industries, Inc. ("Mohawk"). There is no emergency. In fact, Plaintiffs have filed no motion or request for relief that would warrant asking this Court to drop everything and conduct an "emergency" hearing. Plaintiffs have not moved the Court for sanctions, to disqualify counsel, or for any other relief. Instead, they simply want to use a complaint filed two weeks ago by a disgruntled former Mohawk employee as an excuse to conduct a hearing in order to determine whether there is any basis for a motion. Plaintiffs have it backwards. Plaintiffs need to investigate, determine whether there is a basis under Rule 11 to file and sign a motion, and then file that motion. *See* Fed. R. Civ. Proc. 11. If—and only if—Plaintiffs and their counsel are willing to file a motion that makes these allegations under the standards of Rule 11(b) (and subject to the potential for sanctions pursuant to Rule 11(c)) would any evidentiary hearing conceivably be warranted. *See id.*

There is no factual or legal basis for the emergency hearing sought by Plaintiffs. Mr. Carpenter has not made his ludicrous allegations under oath (and subject to cross-examination), and neither Mohawk nor the other defendants he names in his complaint have had an opportunity to respond. In fact, the documentary record—including Mr. Carpenter's own emails—flatly contradict the ridiculous version of events in the complaint Mr. Carpenter filed after being fired by Mohawk. Plaintiffs admit that they have not even spoken to Mr. Carpenter, and there is no other evidence to corroborate his unsworn allegations.

At best, Plaintiffs' Motion represents an overly credulous acceptance of Mr. Carpenter's allegations. At worst, the Motion suggests gamesmanship and an effort to flout the discovery rules by seeking testimony from Mohawk employees—and even Mohawk's lead counsel —without noticing a deposition and before this Court has granted leave to proceed with merits discovery.[2] In either case, Mr. Carpenter's allegations are certainly not grounds for this Court to try the merits of the *Carpenter* complaint by holding an "evidentiary hearing." The place for testing Mr. Carpenter's allegations is *Carpenter v. Mohawk*, not *Williams v. Mohawk*.

If Plaintiffs want to champion Mr. Carpenter's allegations against Mohawk, their first appropriate step here would be to conduct discovery under the normal rules. If they wish, Plaintiffs can notice a deposition of Mr. Carpenter, where he will have the opportunity to make his allegations under oath and subject to penalty of perjury, and where he can be cross-examined and confronted with his own contradictory statements. *See* Ex. A (discussed *infra*). They can pursue any other discovery they choose. Then, if Plaintiff's counsel still wants to link their own credibility to Mr. Carpenter, they can pursue his allegations of "witness tampering" in the ordinary course. In particular, Plaintiffs' counsel can file any motions that they believe are consistent with their obligations under Rule 11. But, at the very least, Plaintiffs' counsel should be required to file some motion seeking substantive relief *before* this Court puts Mohawk's trial counsel, its general counsel or its executives under oath in an evidentiary hearing.

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[2] This is not the first time that Plaintiffs have attempted to induce the Court to grant them immediate discovery based on exaggerations and overblown claims of "evidence" requiring immediate investigation. *See, e.g.*, Pls.' Mot to Lift the Stay of Discovery at 2 (July 29, 2005) (claiming that prospects for Supreme Court review were "remote" five months before the Supreme Court granted certiorari); Pls.' Br. in Supp. of Mot. to Commence Discovery at 5 (Dec. 12, 2006) (demanding discovery before Supreme Court ruled on Mohawk's second petition for certiorari based on a plaintiff's affidavit identifying two Mohawk employees who allegedly were unauthorized to work).

## BACKGROUND

Plaintiffs admit that the only basis for their Motion are the allegations in the complaint filed two weeks ago in *Carpenter v. Mohawk Industries*, Civ. Act. No. 4:07-cv-049-HLM (N.D. Ga.). *See* Mot. Ex. A (hereafter "Carpenter Complaint"). Plaintiffs have never spoken to Mr. Carpenter, *see* Mot. at 1, and they have not produced any other evidence corroborating his allegations. Nor could they. As his own statements demonstrate, Mr. Carpenter's wild allegations that he was fired because of some conspiracy to influence his testimony are pure fantasy. The true facts are these. On June 1, 2006, Mohawk hired Mr. Carpenter as a Shift

Supervisor at Mohawk's Union Grove manufacturing facility. Mr. Carpenter was hired as a salaried employee, *see* Ex. B, and his responsibilities included the supervision of hourly Mohawk employees. *See* Carpenter Compl. ¶¶ 21, 23. Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct. During November 2006, Mr. Carpenter sent several emails concerning staffing needs to Becky Hale, a Mohawk Senior Employment Coordinator. *See* Ex. A at 1-2. On November 22, 2006, Mr. Carpenter asked Ms. Hale to cause a temporary agency to hire a particular worker and send her to Mohawk to work: "Will you try to get Tania Perez back for me through Aliyah Temp[orary] Service[.] She called me the other day and she had her [b]aby and wants to come back to work for me." *Id.* at 2. Ms. Hale responded on November 27 offering to hire the worker directly as a Mohawk permanent employee: "Why don't you send her to me to be hired straight through Mohawk?" *Id.* Mr. Carpenter responded later that evening that he wanted to send the worker to a temp agency because "[h]er papers[,] she says[,] are not good." *Id.* Mr. Carpenter's attempt to have Mohawk send a worker that Mr. Carpenter believed to be unauthorized to a temporary agency was a clear violation of Mohawk's Code of Ethics and an attempt to circumvent federal immigration law. *See* 8 U.S.C. § 1324a(a)(1)(A).

The next morning, Ms. Hale appropriately responded, categorically refusing to permit the worker to work at Mohawk: "Then she can not be allowed to work here." Ex. A at 2. Undeterred and apparently frustrated that his ploy was being thwarted by Mohawk's human resources department, Mr. Carpenter responded later that day in a last-ditch effort, claiming that "90% of the people that come through the temp [agency] do not have good papers [and] that[']s why they come to us that way[.]" *Id.* at 1. Ms. Hale immediately forwarded the email chain to Mohawk management to report Mr. Carpenter's attempt to have an unauthorized worker hired and his assertion that some of the temporary workers under his supervision were unauthorized.

After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.

As a result of Mr. Carpenter's misconduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.

Mr. Carpenter, however, sought to make Mohawk pay. Taking advantage of the fact that Mohawk is currently a defendant in this case, Mr. Carpenter filed a complaint alleging a hodgepodge of federal and state law claims, purporting to arise out of his termination in

December 2006. *See* Carpenter Compl. ¶ 30. Mr. Carpenter's complaint, which notably fails to attach his self-incriminating email, is a sad effort to extort Mohawk and falsely portray Mr. Carpenter as a whistleblower who was fired for reporting misconduct. But as Exhibit A demonstrates, Mr. Carpenter was not reporting his "concern[s]" about the possibility of illegal aliens working as temporary workers at Mohawk, *id.* at 30—he was affirmatively trying to have an illegal alien hired as a temporary worker. And Mr. Carpenter's claim that Mohawk fired him on the "wholly fabricated" pretext that he had harbored illegal aliens is itself an obvious fabrication in light of his blatant attempt to convince Ms. Hale to hire Tania Perez. *Id.* at ¶ 53. Mr. Carpenter's demonstrably false and fundamentally illogical[3] complaint provides no reason for this Court to grant Plaintiffs' unprecedented demand that they be allowed to conduct a full-blown, fast-tracked trial on the merits of his preposterous allegations.

## ARGUMENT: THERE IS NO BASIS FOR AN "EVIDENTIARY HEARING" ON CARPENTER'S CLAIMS.

There is no legal basis for Plaintiffs' request to prosecute a full-blown collateral trial on the merits of Mr. Carpenter's allegations. To begin with, the record before the Court suggests that Mr. Carpenter's allegations are pure fantasy.[4] Based upon this non-existent evidentiary foundation—with no sworn testimony or supporting documents—Plaintiffs seek "an evidentiary hearing concerning the allegations in *Carpenter v. Mohawk Industries, Inc.*" *See* Mot. Ex. D ¶ 1. Plaintiffs demand a trial with immediate (and unilateral) discovery from Mohawk, seeking the production of a broad class of documents. *Id.* at ¶ 4(a)-(e). At that evidentiary hearing, Plaintiffs would seek testimony from Mr. Carpenter and several Mohawk executives named in his complaint. *Id.* at ¶¶ 2, 3(a)-(d). Plaintiffs also demand the right to examine Mohawk's general counsel and its lead outside counsel for this litigation. In sum, Plaintiffs seek to conduct a trial on Mr. Carpenter's claims—*before* the legal deficiencies in his complaint have been challenged, before discovery and even before they are willing or able to file a motion based upon those allegations.

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[3] If an unethical company were attempting to influence an individual employee's future testimony in a manner favorable to the company, the last thing that such a company would do is summarily fire the employee without a severance package. But that is precisely what Mohawk did here.

Plaintiffs can cite no precedent for what they are seeking, and none exists. They argue, however, that Mr. Carpenter's claims suggest that Mohawk might be "intimidat[ing] potential class members" and therefore implicate this Court's January 14, 2004 Class

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[4] It is telling that Mr. Carpenter does not allege to have personal knowledge of his most lurid accusations. *See, e.g.*, Carpenter Compl. ¶¶ 37-39 (hypothesizing "upon information and belief" about the intentions of the supposed conspirators to intimidate Mr. Carpenter); *id.* at ¶ 44 (similarly asserting "upon information and belief" a summary of a supposed meeting between Mohawk and its counsel).

Communication Order. *See* Br. in Supp. of Mot. at 5-6. But *Mr. Carpenter is not a putative class member.* Mr. Carpenter was a salaried Shift Supervisor at Mohawk's Union Grove facility. *See* Ex. B (copy of Mr. Carpenter's employee information sheet indicating that he was "salaried"). Thus, he is not a member of the putative class, which Plaintiffs have limited to hourly Mohawk workers. *See* Compl. ¶ 39 ("Plaintiffs bring this action on behalf of all persons legally authorized to be employed in the United States who are or have been employed by Mohawk in *hourly wage positions* in Georgia at any time from January 5, 1999 to the present." (emphasis added)).

Even if he were an hourly employee, Mohawk's investigation of and response to his misconduct has nothing to do with the Class Communications Order. Mohawk and its counsel communicated with Mr. Carpenter in relation to an internal investigation of alleged misconduct by Mr. Carpenter—not about this litigation. Mohawk certainly retains the right to respond to and investigate employee misconduct or violation of its compliance and other policies without first seeking permission from Plaintiffs' counsel. Nothing in the Class Communications Order requires Mohawk to turn a blind eye to unethical or illegal conduct. The bottom line is that there is no credible claim that the Class Communications Order has been violated. Accordingly, that Order provides no basis for any hearing.

*Second*, Plaintiffs vaguely claim that this Court has the "inherent authority" to order an evidentiary hearing "to protect the judicial process." Br. in Supp. of Mot. at 9. That is true, but such authority should be "exercised with restraint and discretion." *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 696 (N.D, Ga. 1998) (Murphy, J.). Here, Plaintiffs' counsel wants to have an "evidentiary hearing" (*i.e.*, discovery) not contemplated by the Federal Rules or this Court's standing orders based upon untested allegations of which they have no personal knowledge. And those allegations are demonstrably at odds with the facts. This is obviously insufficient.[5]

In fact, Plaintiffs are not seeking simple discovery. They want to interrogate opposing counsel regarding their advice to a client in the midst of litigation—and thereby intrude upon the attorney client and work product privileges—based upon a complaint filed by a disgruntled former employee to whom Plaintiffs' lawyers have not even asked a single question. By seeking to proceed in this fashion, Plaintiffs hope to circumvent the legal standards applicable to those who seek the testimony of opposing counsel. *See, e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002) (discovery from opposing counsel requires requesting party to show that "'no other means exist to obtain the information . . . the information sought is relevant and nonprivileged and . . . the information is crucial to the preparation of the case" (quoting *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)); *Shelton*, 805 F.2d at 1327 ("Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent."); *see also Boughton v. Cotter Corp.*, 65 F.3d 823, 828-30 (10th Cir. 1995) (adopting *Shelton* standard); *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 185 (2d Cir. 1991) (noting that "depositions of opposing counsel are disfavored"). Plaintiffs neither cite nor address this well-settled standard.

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[5] Plaintiffs' citation to cases in which courts exercised their "inherent authority" to prevent witness tampering only illustrates the unreasonableness of their request here. The first case Plaintiffs cite is one where the Court *refused* to grant sanctions because the allegations of witness tampering were vague and unsubstantiated (but far more credible than Mr. Carpenter's). *See* Br. in Supp. of Mot. at 10 (citing *Helios Software GMBH v. Root Int'l Dist. Sys., Inc.*, No. C-94-20838, 1996 WL 162962, at *2 (N.D. Cal. Apr. 5, 1996). The other two are cases in which a party had either admitted to witness tampering, *see Lee v. Sass*, No. 04-70550, 2006 WL 799176, at *2 (E.D. Mich. Mar. 29, 2006), or where sworn deposition testimony indicated that a witness had been influenced. *See Ty, Inc. v. Softbelly's, Inc.*, 353 F.3d 528, 536-37 (7th Cir. 2003). And Plaintiffs' citation to cases where defendants have been criminally convicted of witness tampering and obstruction of justice is as offensive and misleading to the Court as it is irrelevant. *See* Br. in Supp. of Mot. at 7.

Mohawk intends to defend and prevail in the *Carpenter* litigation. That litigation, however, is the appropriate forum for testing Mr. Carpenter's allegations. Plaintiffs should not be permitted to impose unprecedented burdens on this Court and to circumvent the Federal Rules of Civil Procedure by seeking a trial on Mr. Carpenter's allegations in a short-notice hearing with unilateral discovery.

If Plaintiffs wish to champion or even pursue Mr. Carpenter's allegations, they can do so through the normal discovery process. If Plaintiffs wish to depose Mr. Carpenter (who has tellingly refused to speak with them voluntarily), they can issue a subpoena. And if Plaintiffs wish to discover non-privileged documents related to Mr. Carpenter's termination, they can do so at the appropriate time by filing requests for production. Mohawk will preserve all relevant information for the duration of this litigation and the *Carpenter* litigation.

This premise of Plaintiffs' motion—and the inherent slur against Mohawk, its executives and its counsel—is unfortunate, but not surprising. It is instead a reflection of desperation tactics and gamesmanship often associated with meritless strike suits. But this Court should have no doubt that Mohawk's counsel have observed and will continue to observe their ethical obligations, without regarding to the tactics and theatrics reflected by the instant Motion.

## CONCLUSION

WHEREFORE, Defendant respectfully requests that the Court deny Plaintiffs' Emergency Motion for an Evidentiary Hearing Regarding Mohawk's Contact With Witnesses.

Dated: March 30, 2007

Respectfully submitted,

/s/ R. Carl Cannon
R. Carl Cannon, Georgia Bar No. 108000
CONSTANGY, BROOKS & SMITH, LLC
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Washington, D.C. 20005
(202) 736-8000

Attorneys for Defendant
Mohawk Industries, Inc.

*Appendix P*

# EXHIBIT A

Kirk Prather/Calhoun/Mohawk
11/29/2006 11:16 AM

To Pedi Silver/HR/Corp/Mohawk@Mohawk
cc
bcc
Subject Fw: Employee Needs

Please see the message string below. I will call you this afternoon to discuss before I speak with Norman.

Thanks,
Kirk

----- Forwarded by Kirk Prather/Calhoun/Mohawk on 11/29/2005 11:16 AM -----

Becky Hale/Calhoun/Mohawk
11/29/2006 11:11 AM

To Kirk Prather/Calhoun/Mohawk@Mohawk
cc
Subject Fw: Employee Needs

Would you like to advise Norman?

Becky Hale
Senior Employment Coordinator
Wall Street
Phone (706)624-5352
Fax (706) 602-6081

----- Forwarded by Becky Hale/Calhoun/Mohawk on 11/29/2006 11:10 AM -----

Norman Carpenter/Calhoun/Mohawk
11/28/2006 05:26 PM

To Becky Hale/Calhoun/Mohawk@Mohawk
cc
Subject Re: Employee Needs

Becky , 90% of the people that come through the temp do not have good papers thats why they come to us that way I can tell you that most of the people working today here through a temp do not have one of two things either a GA I.d. or good papers through the I.N.S. Thanks, Norman
Becky Hale/Calhoun/Mohawk

Becky Hale/Calhoun/Mohawk
11/28/2006 08:52 AM

To Norman Carpenter/Calhoun/Mohawk@MOHAWK
cc
Subject Re: Employee Needs

BEST AVAILABLE COPY

Then she can not be allowed to work here.

Becky Hale
Senior Employment Coordinator
Wall Street
Phone (706)624-5352
Fax (706) 602-8081

Norman Carpenter/Calhoun/Mohawk

Norman Carpenter/Calhoun/Mohawk
11/27/2006 06:57 PM

To Becky Hale/Calhoun/Mohawk@Mohawk
cc
Subject Re: Employee Needs

Becky , Her papers she says are not good . Thanks,Norman Carpenter
Becky Hale/Calhoun/Mohawk

Becky Hale/Calhoun/Mohawk
11/27/2006 09:34 AM

To Norman Carpenter/Calhoun/Mohawk@MOHAWK
cc
Subject Re: Employee Needs

Why don't you send her to me to be hired straight through Mohawk?

Becky Hale
Senior Employment Coordinator
Wall Street
Phone (706)624-5352
Fax (706) 602-8081

Norman Carpenter/Calhoun/Mohawk

Norman Carpenter/Calhoun/Mohawk
11/22/2006 09:24 PM

To Becky Hale/Calhoun/Mohawk@Mohawk
cc
Subject Re: Employee Needs

Becky, Will you try to get Tania Perez back for me through Aliyah Temp Service She called me the other day and she had her Baby and wants to come back to work for me . Thanks, Norman Carpenter
Becky Hale/Calhoun/Mohawk

Becky Hale/Calhoun/Mohawk

To

Norman Carpenter/Calhoun/Mohawk@MOHAWK

[redacted] 11/22/2006 09:45 AM

cc

Subject Re: Employee Needs

I am sending you every person that has any type of sewing experience.

Becky Hale
Senior Employment Coordinator
Wall Street
Phone (706)624-5352
Fax (706) 602-8081

Norman Carpenter/Calhoun/Mohawk

[redacted] Norman Carpenter/Calhoun/Mohawk
11/21/2006 05:12 PM

To Becky Hale/Calhoun/Mohawk@Mohawk
cc
Subject Re: Employee Needs

Becky , What is the outlook for sergers when? Thanks, Norman Carpentar
Becky Hale/Calhoun/Mohawk

[redacted] Becky Hale/Calhoun/Mohawk
11/21/2006 01:10 PM

To Norman Carpenter/Calhoun/Mohawk@MOHAWK
cc
Subject Re: Employee Needs

The packers will be there Monday.

Becky Hale
Senior Employment Coordinator
Wall Street
Phone (706)624-6352
Fax (706) 602-8081

Norman Carpenter/Calhoun/Mohawk

[redacted] Norman Carpenter/Calhoun/Mohawk
11/18/2006 10:49 PM

To becky_hale@mohawkind.com
cc
Subject Employee Needs

EXHIBIT A - 20

**Becky , I Need the 3 packers I asked you about Last week right away ,Burgers should just keep on coming till I fill up all the positions we are fighting the pregnant women their are alot on my shift . Thanks, Norman Carpenter**

Norman Carpenter UG3

**Supervisor**

**" Keep on Smiling "**

# EXHIBIT B

# NEW EMPLOYEE INFORMATION

REDACTED

POSITION CODE UGFISU

DATE OF HIRE 6/1/06

NAME Norman R. Carpenter

ADDRESS REDACTED

CITY Dalton STATE Ga ZIP CODE 30721

TELEPHONE NUMBER REDACTED

DATE OF BIRTH 8/15/1966

MALE ✓ FEMALE

MARRIED ✓ SINGLE

PAY RATE $41,000

HOURLY SALARIED ✓

RACE white

SHIFT 2nd

FEDERAL TAXES yes STATE TAXES yes

HIRE SOURCE

COST CENTER 2340 LOCATION CODE 269

SUPERVISOR Kevin Palmer

JOB TITLE Supervisor

REDACTED

# APPENDIX Q — DEFENDANT MOHAWK INDUSTRIES, INC.'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL, DATED SEPTEMBER 14, 2007

## UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION
FILE NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff

vs.

MOHAWK INDUSTRIES, INC.
and PATRICIA SILVER,

Defendants.

## DEFENDANT MOHAWK INDUSTRIES, INC.'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

At the outset of discovery, Plaintiff's Motion to Compel asks this Court to find that Mohawk has waived the attorney-client privilege as it relates to all issues in this case. Based almost entirely on allegations and hunches, without any facts, and ignoring applicable law, Plaintiff asks the Court to pierce entirely the attorney-client privilege that exists between Mohawk and its counsel. In addition, Plaintiff seeks the work product of Mohawk's outside counsel, along with confidential and privileged memoranda from Mohawk's outside counsel to their client.

Plaintiff can establish no viable basis for his motion. This is not a motion that should have been filed in the first place—certainly at this stage of the case, if ever. The fact that Plaintiff filed it without any factual basis for the relief sought raises questions about its true purpose. It is certainly not to obtain answers to proffered interrogatories. The communications and documents at issue are privileged and the Court should deny Plaintiff's Motion to Compel.

## BACKGROUND

This case arises out of the termination of Plaintiff's employment with Mohawk. His termination arose out of his attempt to cause Mohawk to have a temporary agency hire Tania Perez, even though he believed "[h]er [work authorization] papers . . . are not good." Exhibit A, p.2 to Mohawk's Opposition to Plaintiffs' Emergency Motion for an Evidentiary Hearing (filed 3/30/07 in *Williams* case). When Mohawk's Human Resources employee turned Plaintiff's request down, Plaintiff pushed back, asserting that "90% of the people that come through the temp do not have good papers." *Id.* at 1. Mohawk then commenced an immediate internal investigation of Plaintiff's claim that certain temporary workers at the Union Grove Road facility were not authorized to work in the United States.

As part of that investigation, Plaintiff was interviewed by Mohawk's outside counsel, Juan Morillo on December 4, 2006, for the purpose of providing legal advice to the company. *See* Declaration of Salvatore J. Perillo, ¶ 3, attached as Exhibit A. Plaintiff alleges that during that meeting and after, he was threatened in order to keep him from testifying in the *Williams* case. Am. Compl. ¶¶ 46 and 47.

Mohawk later determined that Plaintiff should be removed from his position because his attempt to hire an unauthorized worker violated Mohawk policy. Subsequently, Mohawk terminated Plaintiff for cause. Plaintiff now claims that his firing did not arise from his own misconduct—instead, Plaintiff claims that it was part of some conspiratorial effort by Mohawk's employees and outside counsel to keep him from testifying in the *Williams* case, allegedly in violation of 42 U.S.C. § 1985 (2). *See* Amended Complaint, ¶ 1.

Based principally on these facts, along with the unverified allegations in the Amended Complaint, Plaintiff, without identifying a specific communication or document at issue, asks the Court to determine that *all* communications that have ever taken place between Mohawk and its counsel that relate in any way to the Plaintiff are either not privileged, or that any privilege associated with those communications has been waived. Notably, Plaintiff points to no actual disclosures of *any* privileged information by Mohawk.

## 1. The discovery requests "at issue."

As required by the Local Rules, Plaintiff identifies the discovery requests purportedly "at issue" on this Motion. Notably, however, Plaintiff does not address any specific issues with Mohawk's responses, instead he just lists them as a false springboard to seek a broader ruling that there is no attorney-client privilege in the case. As evidenced below, Plaintiff's Motion is not driven by a desire for discovery, but instead by a tactical motivation to try and gain leverage against Mohawk by attempting to place privileged communications at risk and thereby raising the stakes.

A review of the allegedly contested discovery requests narrows the scope of the communications and documents really "at issue," and further demonstrates the overreaching nature of the relief Plaintiff seeks on this Motion.[1]

### A. Interrogatories.

Plaintiff's Interrogatory No. 1 asks the following:

> Identify all individuals by name and job title who were involved in the decision to request that Carpenter be interviewed by Juan Morillo, Esq. ("Morillo"). "Involved" is defined

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[1] In his Motion, Plaintiff purportedly seeks to compel a response to Interrogatory Number 4, but in the Brief in support of his motion contends that Interrogatories 1-4 are "at issue."

> as any individual who made the decision (whether not jointly with one or more individuals), was conferred with in connection with the decision, reviewed the decision before it was implemented, or was informed of the decision before it was implemented.

Interrogatory No. 2 asks the following:

> For each such person identified in Mohawk's response to Interrogatory No. 1, identify the specific role that person played in the decision referenced in Interrogatory No. 1.

In response to these Interrogatories, Mohawk stated:

> Mohawk objects to this interrogatory as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving this or the General Objections, Mohawk responds as follows: Sal Perillo, former General Counsel to Mohawk.[2]

Mohawk has fully responded to these two interrogatories by identifying Mr. Perillo. There is no other information to disclose. Further responding to this interrogatory would require Mohawk to disclose Mr. Perillo's thought processes, or read broadly, the contents of the conversations between Mr. Perillo and Mr. Morillo. This, of course, is ultimately what Plaintiff seeks the Court to compel Mohawk to disclose, but he provides no basis for such a broad disclosure. All he provides are the allegations of misconduct and conspiracy in the Amended Complaint concerning the discussions between Mr. Perillo and Mr. Morillo. These assertions are unverified, supported with no facts and are offered "upon information and belief." *See, e.g.*, Am. Compl., ¶¶ 40 and 41. Thus, there is no basis to compel any further response to Interrogatories Numbers 1 and 2.

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[2] Mohawk responded to Interrogatory No. 2 by incorporating its response to Interrogatory No. 1.

Plaintiff's Interrogatory No. 3 asks:

> Identify all individuals by name and job title who were involved in the decision to terminate Carpenter's employment with Mohawk. "Involved" is defined as any individual who made the decision (whether or not jointly with one or more individuals), was conferred with in connection with the decision, reviewed the decision before it was implemented, or was informed of the decision before it was implemented.

Interrogatory No. 4 asks:

> For each such person identified in Mohawk's response to Interrogatory No. 3, identify the specific role that person played in the decision referenced in Interrogatory No. 3.

Mohawk responded as follows:

> Mohawk objects to this interrogatory as it seeks information protected by the attorney-client privilege and the attorney work product doctrine. Subject to, and without waiving this objection or the General Objections, Mohawk responds as follows: Sal Perillo, Jerry Melton, Patti Silver and Juan Morillo.[3]

Here, Mohawk has fully disclosed the names of the individuals involved in the decision to terminate Plaintiff's employment and therefore has fully answered Interrogatory number 3, leaving only interrogatory number 4 at issue. Notably, Plaintiff does not ask the Court to compel Mohawk to respond more fully to Interrogatory number 4. Instead, Plaintiff makes no further mention of the specific request, does not identify a single challenged communication, and asks the Court to rule that there could be no privilege surrounding *any* of these communications.

As discussed in more detail below, disclosing the "who said what to whom" of these communications would necessarily delve into attorney-client privileged communications. Thus, there is no basis to compel any further response to Interrogatory Number 4.

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[3] Plaintiff states that Mohawk responded to this Interrogatory by incorporating its response to Interrogatory No. 1. This is incorrect. Mohawk actually responded to Interrogatory No. 4 by incorporating its response to Interrogatory No. 4. Upon noticing this typographical error, Mohawk has served an amended response indicating that Mohawk was responding by incorporating its response to Interrogatory No. 3, which is clearly related to Interrogatory No. 4.

### B. Document Requests.

Plaintiff lists ten separate document requests that he also contends are "at issue" on this Motion. Plaintiff further complains that Mohawk has "produced *no* document related to or referencing Morillo's interview of Carpenter or even the purported reasons for its termination of Mohawk." Plaintiff's Brief, p. 14.

As a preliminary matter, Mohawk has in fact produced documents related to the Plaintiff's termination. In connection with its objections of privilege, however, Mohawk produced a Privilege Log that identified the documents withheld, and for each, the date, author, recipient, description and basis for the objection.[4] Once again, Plaintiff makes no further mention of the specific documents, and has not asked the Court to simply compel production of these four documents. Rather, Plaintiff steps way beyond the parameters of those requests and the documents allegedly "at issue," asking this Court to find that Mohawk has no attorney-client privilege in this case.

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[4] Mohawk's Privilege Log is attached as Exhibit B.

## ARGUMENT AND CITATION OF AUTHORITIES

Plaintiff has simply filed a lawsuit containing far-fetched allegations about witness tampering by Mohawk's counsel and, based upon that, expects to be permitted the opportunity to trample through the attorney-client privilege. In order to succeed, Plaintiff must first discard the historical underpinnings for the privilege and then rewrite a century of law on the issue. This Motion is wrong and should never have been filed in the first place. The communications and documents at issue on this Motion are privileged and there has been no waiver of this privilege. The Court should deny this sweeping Motion to Compel that is based almost entirely on allegations and suggestions, ignoring the applicable law concerning attorney-client privilege.

The attorney-client privilege is the oldest of the privileges for confidence of communications known to the common law. *See Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The attorney-client privilege exists to protect confidential communications between client and lawyer made for the purposes of securing legal advice. *In re Grand Jury Proceedings,* 899 F.2d 1039, 1042 (11th Cir. 1990). Like an individual, a corporation can also invoke the attorney-client privilege. *Upjohn,* 449 U.S. at 390. A party claiming privilege must establish each of the following four elements: 1) the holder of the privilege is a client; 2) the person to whom the communication was made was a member of the bar and that person is acting as a lawyer in connection with the communication; 3) the communication relates to a fact of which the attorney was informed by the client without the presence of strangers for the purpose of securing legal advice; and 4) the privilege is claimed and not waived by the client. *See In re Grand Jury Proceedings*, 899 F.2d at 1042 (additional citations omitted).

### 1. Communications during internal investigations are covered by the attorney-client privilege.

The communications at issue on this Motion are protected from disclosure under the attorney-client privilege. Plaintiff's principal argument on this motion is that the attorney-client privilege does not exist because Mr. Morillo, as outside counsel for Mohawk, interviewed the Plaintiff as part of an internal investigation. Plaintiff contends that because Mohawk has stated in submissions to this Court that the communications with Plaintiff were not *about* the *Williams* litigation, that no such privilege exists over these communications. *See* Plaintiff's Brief, p. 18. Plaintiff's argument is wrong on two points. First, it misconstrues Mohawk's statements in opposition to the Motion for Emergency Hearing in the *Williams* case. Second, it ignores established precedent concerning attorney-client privileged communications in internal investigations.

### A. The interview was clearly related to the *Williams* litigation.

Mohawk has never stated that the investigation and interview of the Plaintiff was not *related* to *Williams*, as argued in Plaintiff's Brief. *See* Plaintiff's Brief, p. 18. To the contrary, Mr. Morillo is counsel for Mohawk in the *Williams* case. Only common sense is required to understand the connection. Mr. Morillo is the outside counsel that was retained to provide advice to the company on issues of alleged immigration violations raised in the *Williams* case. Thus, it is not surprising that he was asked to advise Mohawk regarding Plaintiff's conduct and e-mails that related to purported violations of federal immigration law. The fact that Mr. Morillo's interview of Plaintiff was not for the purpose of talking about the *Williams* lawsuit does not mean that the interview and investigation were in no way related (in a legal or practical sense) to the *Williams* case—where federal immigration issues are squarely at issue. Plaintiff's contention that Mr. Morillo's role in conducting an investigation was wholly unrelated to the *Williams* litigation not only misconstrues Mohawk's prior statements to the Court, but also belies common sense.

### B. Attorney-client communications as part of an internal investigation are privileged.

Plaintiff then contends that the privilege is non-existent because the interview was part of an internal investigation. The distinction is of no difference on the privilege issues. Whether as part of work related to the *Williams* case, part of a distinct internal investigation, or even some combination of the two, the communications are privileged.

An attorney conducting an internal investigation for his corporate client is protected by the attorney-client privilege in communications with corporate employees. *Upjohn*, 449 U.S. at 394-95.[5] In fact, *Upjohn* itself involved privileged communications with employees during the course of a corporate internal investigation. *Id.* at 386. Part of any internal investigation will often require counsel to interview employees at all levels, including the employee suspected of misconduct. These conversations are protected as well. Indeed, the Supreme Court recognized this very need for protection and frank discussion in *Upjohn*, stating:

> In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—"officers and agents . . . responsible for directing [the company's] actions in response to legal advice"—who will possess the information needed by the corporation's lawyers. Middle-level-and, indeed, lower-level-employees can, by actions within the scope of their employment, embroil the corporation in

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[5] For a lengthy discussion of the attorney-client privilege in the context of internal corporate investigations, *see* Danik, Webb, et al., *Corporate Internal Investigations*, Ch. 6 (1993).

> serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

*Upjohn*, 449 U.S. at 391. As such, Plaintiff's argument that the communications are not privileged because they took place during an internal investigation, or because Plaintiff was only a 6-month supervisor, is unsupportable.[6]

## 2. The challenged communications were privileged.

Plaintiff does not even try to identify the specific communications at issue. Instead, Plaintiff seeks a sweeping ruling that there is no privilege anywhere. Thus, Mohawk (and the Court) is forced to guess as to which specific communications Plaintiff contends are discoverable. Fundamentally, the basic elements of the attorney-client privilege have been met for the communications at issue to be protected, even as part of an internal investigation. *See In re Grand Jury Proceeding,* 899 F.2d at 1042 (describing basic elements of attorney-client privilege); *See also Upjohn,* 449 U.S. 383 (applying attorney-client privilege to corporate internal investigations). Those elements are met here.

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[6] Plaintiff cites *Burlington Ind., Inc. v. Rossville Yarn, Inc.*, No. 4:95-CV-0401-HLM, 1997 U.S. Dist. LEXIS 10347 (N.D. Ga. June 3, 1997), for the proposition that Plaintiff did not have a "significant relationship" to the subject matter of the privileged communication. Plaintiff's Brief, p. 19. That position is simply wrong on the law and the facts. Plaintiff undoubtedly had a very "significant relationship" to Mohawk's investigation of Plaintiff's own conduct. Therefore, under both *Upjohn* and this Court's holding in *Burlington*, Mr. Morillo's communication with Plaintiff is clearly privileged.

### A. The holder of the privilege was the client.

It is undisputed that Mr. Morillo was outside counsel for Mohawk. It is also undisputed that Mr. Perillo was General Counsel for Mohawk. There does not appear to be any dispute that Mohawk is the client.

### B. The attorney must be a member of the bar and acting as a lawyer.

There is no question here that Mr. Morillo was acting as a lawyer in this case. Indeed, it is undisputed that that Mr. Morillo interviewed the Plaintiff and others for the purpose of providing legal advice to the company. *See* Perillo Decl. ¶ 3. Mr. Morillo's discussions and memorandum to his client concerning that interview are likewise privileged.

Plaintiff does not dispute that Mr. Morillo is an attorney, but instead contends that Mr. Morillo's discussions with the Plaintiff and others were not privileged because he was acting as Mohawk's Human Resources/Corporate Compliance Department in conducting the internal investigation. Plaintiff's Brief, p. 18. There is absolutely no basis for this position, and Plaintiff cites to nothing in support of this theory. The position taken by the Plaintiff on this issue borders on absurd, given Mr. Morillo's relationship as outside counsel to the company and represents the company in the *Williams* case, as discussed above.

Further, the mere fact that Mr. Morillo may have been involved in discussions about the decision to terminate Mr. Carpenter does not negate the privilege surrounding those decisions. Plaintiff describes this as a "business task." Indeed, business issues are often discussed as part of the process of providing legal advice. While Plaintiff cites to *BellSouth Advertising & Publishing Corp. v. American Business Lists, Inc.*, No. 1:90-CV-149-JEC, 1992 U.S. Dist LEXIS 17679 (N.D. Ga. Sept. 8, 1992) for the proposition that the attorney-client privilege does not extend to business matters, the *BellSouth* Court went on to state that "[t]he attorney-client privileged [sic] is not lost, however, if business advice is simply incorporated into legal advice of counsel." *Id.* at *24. *See also Coleman v. Am. Broadcasting Co.*, 106 F.R.D. 201, 206 (D. D.C. 1985) (holding that "[t]he mere fact that business considerations are weighed in the rendering of legal advice does not vitiate the attorney-client privilege."); *Kelly v. Ford Motor Co., (In re Ford Motor Co.)*, 110 F.3d 954, 966 (3d Cir. 1997) (holding that minutes of meeting were privileged because, even if committee's final decision was a business decision, it "reached that decision only after examining the legal implications of doing so" and decision was "infused with legal concerns.")

### C. No strangers were present at any of these communications and the communications were certainly provided for the purpose of securing legal advice.

The communications at issue involve solely Mohawk employees and Mohawk lawyers. The interviews of Mr. Carpenter and Ms. Martinez were attended by those individuals, Mr. Morillo and Mr. Morillo's legal assistant. No strangers were present. Any subject communications that have been objected to in the interrogatories, mainly communications between or among Mr. Morillo, Mr. Perillo, Ms. Silver and Mr. Melton, all took place without any strangers present. Plaintiff does not appear to contest this fact. Additionally, it is undisputed that the interview of the Plaintiff took place for the purpose of securing legal advice. *See* Perillo Decl. ¶ 3.

### D. The privilege has been claimed and not waived.

Mohawk has consistently claimed privilege over the documents and other communications at issue in this motion. Plaintiff does not appear to contest the fact that Mohawk has claimed the privilege. Mohawk has reminded Plaintiff's counsel that these communications are privileged. *See* Letter from Randall Allen to Thomas Munger, April 19, 2007 (attached as Exhibit C). Counsel for the parties has engaged in lengthy discussions concerning the issues. Further, Mohawk objected to the discovery requests at issue on the grounds of privilege, and has asked the Court through its separate Motion for a Protective Order to keep this information confidential. There can be no confusion that Mohawk has claimed the privilege.

### 3. Mohawk has not waived the privilege.

Plaintiff's second argument on this Motion is that even if the challenged communications were privileged, Mohawk has waived the privilege. The attorney-client privilege can be waived: 1) when a client testifies concerning portions of the attorney-client communications; 2) when a client places the attorney-client relationship in issue; and 3) when a client asserts reliance on attorney advice as an element for the defense. *See Cox v. Administrator U.S. Steel & Carnegie,* 17 F.3d 1386, 1418 (11th Cir. 1994). Waiver does not occur when mere facts are disclosed, but only *when the actual communication with the attorney* is disclosed. *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Fla.,* 60 F.R.D. 177, 185-86 (M.D. Fla. 1973) (emphasis added).

#### A. Mohawk has not injected the facts surrounding the interview into this case.

Plaintiff contends that Mohawk has waived the attorney-client privilege because it has "injected" the Plaintiff's interview into the facts of this case. Plaintiff's Brief, p. 21. To the contrary, it is the Plaintiff who has injected these facts into the case by filing this lawsuit and claiming he was injured by his participation in a privileged internal investigation conducted by Mr.

Morillo. Mohawk has disclosed nothing about what happened in that interview or in any other privileged communications related to the Plaintiff. Simply, Mohawk has done nothing to "inject" the interview or any other privileged communication into the facts of this case..

At bottom, Plaintiff's waiver argument rests upon the assumption, albeit not expressly stated, that Mohawk terminated the Plaintiff based on the discussions that took place during the meeting with Mr. Morillo and Mr. Carpenter. Plaintiff provides no support for this factual assertion, other than the bare allegations of the Amended Complaint and arguments in his Brief. Plaintiff asserts without support that that "four individuals . . . considered the results of the investigation (most notably including *and likely only including* Morillo's . . . interview with Carpenter)." Plaintiff's Brief, p. 6. Plaintiff points to no testimony or other evidence to support these theories or suspicions. These mere allegations are entirely insufficient to offer even passing support for any waiver of the attorney-client privilege.

Even if the facts were as Plaintiff surmises, the consideration of legal advice does not waive the privilege that attached to that advice. Further, Plaintiff seeks to blur the line between non-privileged facts and privileged communications about non-privileged facts. The facts surrounding Plaintiff's conduct that led to his termination have been set forth in Mohawk's discovery responses and in filings in the *Williams* case. The existence of those facts was known to the Plaintiff before counsel (his or Mohawk's) ever became involved with this issue, and Mohawk has already provided copies of the e-mails disclosing these facts to the Court and Plaintiff's counsel.[7] These facts themselves are not privileged. If, however, Mohawk employees discussed those facts with its counsel for the purpose of seeking legal advice, those discussions are covered by the attorney-client privilege. *See Upjohn,* 449 U.S. at 389.

### B. Mohawk is not defending its actions by disclosing information that now contends privileged.

Plaintiff contends that Mohawk is defending its actions by disclosing information that it now contends is privileged. Mohawk has done no such thing. Indeed, Mohawk has made no disclosures of the privileged communications that took place in this case. Plaintiff does not cite to a single alleged disclosure of privileged information. Rather, Plaintiff's only assertion of disclosure is an unsupported *allegation* that Ms. Silver stated to Plaintiff, "as you know, you have talked to our attorney." Amended Complaint ¶ 49. This statement, even if true, does not disclose *anything* about any discussions that anyone had with counsel.

In support of this waiver theory, Plaintiff relies on the decision in *Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 455 F. Supp. 2d, 1374 (N.D. Ga. 2006). The *Travel Caddy* decision addresses the "advice of counsel" defense in a patent infringement case. In patent infringement cases, a defendant often may assert this defense to defeat a claim of willfulness. *Id.* at 1376. Mohawk has asserted no such defense in this case. The issue in this case is alleged "threats and intimidation" and Mohawk has not asserted any defense to those claims based on privilege.

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[7] *See, generally,* Mohawk's Brief in Opposition to Plaintiff's Motion for Emergency Hearing filed in *Williams.*

### C. Mohawk is not using the privilege to prejudice the Plaintiff's case.

Next, in arguing waiver, Plaintiff contends that Mohawk is attempting to "use the privilege to prejudice its opponent's case and disclose some selected communications for self-serving purposes." Plaintiff's Brief, p. 22. Once again, Plaintiff, however, points to no disclosures or even any selective disclosures of the privileged information. Instead, he throws out the baseless claim that Mohawk seeks "one-way discovery." In reality, it is the Plaintiff that seeks one-way discovery — his way — forcing Mohawk to provide thorough discovery information that is clearly covered by the attorney-client privilege.

Just as with other arguments, Plaintiff misses the point in arguing prejudice. The facts surrounding Plaintiff's conduct that led to his termination remain unchanged. Those facts are *not* privileged. Mohawk has disclosed those facts, which were known to the Plaintiff himself. The confidential conversions about those facts between Mohawk and its counsel are, however, fundamentally protected by the attorney-client privilege and Plaintiff's conspiracy theories do not change this.

Finally, in support of its waiver argument, Plaintiff relies on the decision in *Rivera v. Kmart Corp.*, 190 F.R.D. 298 (D. P.R. 2000). Plaintiff contends that following *Rivera*, Mohawk has waived the attorney-client privilege because it has relied on the interview between Mr. Morillo and Plaintiff to terminate his employment, and is now hiding behind the contents of that interview. *See* Plaintiff's Brief, p. 25. In *Rivera*, plaintiffs challenged their employment termination by Kmart. Kmart alleged the plaintiffs were terminated because they destroyed merchandise and included it in an insurance claim, and that Kmart was unable to confirm wrongdoing by any other Kmart managers. *See Rivera*, 190 F.R.D. at 303-04. Plaintiffs contended that Kmart fired them because they gave testimony to authorities about receiving instructions to damage merchandise to be included in an insurance claim. *Id.* at 304. The Court ruled that one interview memorandum of a store manager was not privileged, because Kmart had injected that communication into the litigation by relying upon it to support its contention that there was no wrongdoing by other Kmart managers than the Plaintiff. *Id.*

Plaintiff points to no evidence of any such direct connection as in the *Rivera* case where the defendant affirmatively relied upon the interview memorandum to support its defense. Plaintiff just assumes that Mohawk terminated him based on the statements made in the Morillo interview. And he further contends that since

Mohawk had privileged communications about him, that the privilege has been waived. The *Rivera* case does not support Plaintiff's Motion to Compel.[8]

### 4. Mohawk's Privilege Log Is Adequate.

Plaintiff's only assertion that arguably relates to a specific discovery request is the allegation that Mohawk's Privilege Log is inadequate. Specifically, Plaintiff claims that entries #1 and 2 on Mohawk's Privilege Log are inadequate because they are "too general." Plaintiff's Brief, p. 17. Mohawk has adequately identified the documents withheld in its Privilege Log.

Federal Rule Civil Procedure 26(b)(5) provides that a party asserting a privilege claim "make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Fed. R. Civ. P. 26(b)(5)(A). Mohawk has made a *prima facie* showing that the documents listed on its log are protected by the attorney-client privilege and/or attorney work product doctrine.[9] For each document withheld, Mohawk has identified (a) the privilege asserted; (b) the attorney and client involved; (c) the subject matter of the document in a manner sufficient to allow Plaintiff to assess the applicability of the privilege without waiving the privilege; (d) all persons or entities shown on the document to have received or sent the document; and (e) the date the document was generated, prepared, or dated. *See Automed Tech. v. Knapp Logistics & Automation, Inc.*, 382 F. Supp. 2d 1368, 1371(N.D. Ga. 2005)(Court stated that privilege log should include document type, date, author, recipients, and specific basis for the privilege claimed.)

---

[8] Also of note is that the Court in *Rivera*, conducted an *in camera* review of the documents at issue. Plaintiff does not even suggest this half step (which Mohawk believes is unnecessary) to the Court. Instead, Plaintiff boldly demands production of the privileged documents and for the Court to rule that there is no attorney-client privilege in the case.

[9] Mohawk's Privilege Log is attached as Exhibit B.

Plaintiff relies on *Williams v. Taser International, Inc.*, No. 1:06-CV-0051-RWS, 2007 U.S. Dist. LEXIS 30280 (N.D. Ga. June 4, 2007) to support its position. Plaintiff's Brief p. 17. Mohawk's Privilege Log, however, bears no resemblance to the privilege log in question in *Taser International.* In that case, the privilege log did not describe the subject matter of the documents, or even name the authors or recipients of the documents. As described above, and unlike the privilege log in *Taser International,* Mohawk's Privilege Log includes those elements and completely satisfies the requirements of Rule 26(b)(5)(A).

## CONCLUSION

For the reasons stated above, this Court should deny Plaintiff's Motion to Compel. Mohawk respectfully requests oral argument on this Motion. This 14th day of September, 2007.

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# APPENDIX R — NOTICE OF APPEAL OF MOHAWK INDUSTRIES, INC., DATED OCTOBER 31, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

CIVIL ACTION
FILE NO. 4:07-CV-049-HLM

NORMAN CARPENTER,

Plaintiff

vs.

MOHAWK INDUSTRIES, INC.
and PATRICIA SILVER,

Defendants.

## NOTICE OF APPEAL OF MOHAWK INDUSTRIES, INC.

Defendant Mohawk Industries, Inc. ("Mohawk") hereby gives notice that it appeals to the United States Court of Appeals for the Eleventh Circuit from this Court's Order entered on October 1, 2007, granting Plaintiff's Motion to Compel. [Dkt. #43]

Mohawk submits that the Eleventh Circuit should assume jurisdiction of this appeal under 28 U.S.C. § 1291 and the collateral order doctrine. Mohawk will also file a separate Petition for Writ of Mandamus with the Court of Appeals, as an alternative basis for jurisdiction.

Respectfully submitted, this 31st day of October, 2007.

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# PETITIONER'S
# BRIEF

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No. 08-678

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SUPREME COURT, U.S.

IN THE
# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

*Petitioner,*

*v.*

NORMAN CARPENTER,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF FOR PETITIONER

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# QUESTION PRESENTED

Whether, under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a party can immediately appeal a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information.

## LIST OF PARTIES

Pursuant to Rule 24.1(b), the names of the parties appearing before the United States Court of Appeals for the Eleventh Circuit appear in the caption.

The Rule 29.6 Statement in the Petition for a Writ of Certiorari remains accurate.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is reported as *Carpenter v. Mohawk Industries, Inc.*, 541 F.3d 1048 (11th Cir. 2008). The order of the Northern District of Georgia (Pet. App. 16a) at issue in the appeal to the Eleventh Circuit is an unpublished October 1, 2007 order that is unofficially reported as *Carpenter v. Mohawk Industries, Inc.*, No. 4:07-CV-0049-HLM, 2007 WL 5971741 (N.D. Ga. Oct. 1, 2007).

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion and judgment in this matter on August 26, 2008. The Petition for a Writ of Certiorari was filed on November 20, 2008 and granted on January 26, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides in relevant part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

## STATEMENT OF THE CASE

The District Court in this case found waiver of the attorney-client privilege and ordered the production of otherwise privileged information. The question presented is whether such an order is immediately appealable under the collateral order doctrine.

Petitioner Mohawk Industries, Inc. ("Mohawk") conducted an internal investigation, through outside counsel, following an employee's allegation of a potential violation of federal immigration laws. The District Court found that Mohawk had waived the attorney-client privilege through limited statements Mohawk made in a brief filed in another case and ordered Mohawk to divulge privileged written and oral communications between the company, its in-house counsel, and Mohawk's outside counsel who conducted the internal investigation. Mohawk immediately appealed the District Court's order. The Court of Appeals for the Eleventh Circuit dismissed the appeal for lack of jurisdiction, refusing to find jurisdiction under the collateral order doctrine. The appeal of an order finding waiver of the attorney-client privilege and compelling the disclosure of privileged information, however, falls squarely within the scope of the collateral order doctrine as first articulated by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and the Eleventh Circuit should not have dismissed Mohawk's appeal.

## I. The Facts Giving Rise to the Underlying Lawsuit.

Mohawk is a leading producer and distributor of residential and commercial flooring products. Headquartered in Calhoun, Georgia, Mohawk employs more than 30,000 people worldwide. Respondent Norman Carpenter ("Carpenter") is a former shift supervisor at a Mohawk manufacturing facility in Calhoun. During his employment at Mohawk, Carpenter requested that the company have a temporary agency hire an individual to work at Mohawk, even though he believed "[h]er [work authorization] papers . . . are not good." J.A. 220a. Mohawk's Human Resources division rejected Carpenter's request. Carpenter then sent an e-mail to Human Resources stating that:

> 90% of the people that come through the temp do not have good papers thats [sic] why they come to us that way I can tell you that most of the people working today here through a temp do not have one of two things either a GA I.d. or good papers through the I.N.S.

J.A. 219a.

In response to this e-mail, Mohawk immediately initiated an investigation of Carpenter's conduct and his assertions that a temporary agency had placed undocumented workers with Mohawk. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo, at the time a partner with Sidley Austin LLP, interviewed Carpenter and other individuals. Attorney Morillo was also counsel for Mohawk in a pending class action lawsuit, *Williams v. Mohawk Industries, Inc.*, Civil Action No. 4:04-CV-03-HLM (N.D. Ga. filed Jan. 6, 2004).[1] Mohawk ultimately terminated Carpenter's employment. A few months later, Carpenter filed this lawsuit, claiming that Mohawk, some of its employees, and its in-house and outside counsel engaged in a conspiracy, threatened him (during Attorney Morillo's interview of Carpenter), and terminated his employment in an effort to keep him from testifying in the *Williams* case. *See* J.A. 58a-59a.

## II. The District Court Order Finding Waiver of the Attorney-Client Privilege and Compelling the Production of Privileged Information.

In his initial discovery requests, Carpenter sought discovery related to Mohawk's internal investigation and the company's decision to terminate his employment. *See* Pet. App. 30a-36a. Because several of Carpenter's discovery requests specifically sought or otherwise encompassed privileged information concerning Attorney Morillo's investigation and his related communications with Mohawk, Mohawk objected to those requests on the grounds of attorney-client privilege and provided a privilege log for the documents withheld. Record 36, Ex. B. In response to Mohawk's objections, Carpenter filed a motion to compel arguing: (i) that the attorney-client privilege did not apply to Attorney Morillo's investigation or his communications with Mohawk; and (ii) that, even if the attorney-client privilege did apply, the privilege had been waived. *See* J.A. 162a.

---

[1] The plaintiffs in the *Williams* case allege that Mohawk has engaged in the improper hiring of illegal aliens. The *Williams* case has also been before this Court. *See Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006). As of the filing of this Brief, the *Williams* case is currently on appeal with the Eleventh Circuit from the District Court's denial of class certification. *Williams v. Mohawk Indus., Inc.*, No. 08-13446-GG (11th Cir. docketed June 17, 2008).

In ruling on the motion to compel, the District Court first found that the communications at issue fell under the protection of the attorney-client privilege. Pet. App. 42a. The court found that Mohawk had sufficiently proven "that Attorney Morillo provided legal services and advice . . . when he interviewed [Carpenter] and discussed the results of that interview with Defendant Mohawk's personnel." *Id.* In this regard, the District Court explained that the "record demonstrates that Attorney Morillo conducted the interview [of Carpenter] as part of a legal investigation seeking to determine whether Defendant Mohawk or [Carpenter] had violated, or had attempted to violate, federal immigration law." *Id.*

The District Court nevertheless granted the motion to compel, finding that, through certain written statements Mohawk made in a brief filed in the *Williams* case, Mohawk had waived the privilege with respect to the communications relating to Attorney Morillo's interview of Carpenter and the decision to terminate Carpenter's employment. Pet. App. 51a. Shortly after Carpenter filed this lawsuit, the *Williams* plaintiffs had filed (in the *Williams* case) an Emergency Motion for an Evidentiary Hearing to establish evidence of the unverified allegations set forth in Carpenter's Complaint and sought to compel the testimony of Attorney Morillo. Pet. App. 18a. Mohawk filed a brief opposing the motion. The district court in *Williams* denied the motion as premature and no hearing ever took place in the *Williams* case. Pet. App. 21a.

In the present case, however, the District Court found that Mohawk waived the attorney-client privilege based entirely on the following three sentences contained in Mohawk's brief in the *Williams* case opposing the emergency hearing:

> After receiving [Mr. Carpenter's e-mail], Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel, Juan P. Morillo, interviewed Mr. Carpenter.

Pet. App. 51a. According to the District Court, by making those representations in the *Williams* case:

> Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between Attorney Morillo and [Carpenter] and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that Defendant Mohawk has waived

> the attorney-client privilege with respect to the communications relating to the interview of [Carpenter] and the decision to terminate [Carpenter's] employment.

*Id.*

Having concluded that the statements in Mohawk's brief in the *Williams* case constituted a waiver of the attorney-client privilege, the District Court ordered Mohawk to supplement its discovery responses to include information previously withheld as privileged and to produce the documents identified in its privilege log. Pet. App. 51a-52a. Among other things, Mohawk was thus ordered to produce: (i) all documents constituting, reflecting, or relating to any communications from Attorney Morillo regarding his meeting with Carpenter; (ii) all documents that reference Attorney Morillo's meeting with Carpenter; (iii) all communications between a member of Mohawk's Legal Department and Attorney Morillo that reference Carpenter; and (iv) all communications between a member of Mohawk's Human Resources Department and Attorney Morillo that reference Carpenter. *See* Pet. App. 52a.

## III. Mohawk's Appeal to the Eleventh Circuit.

In granting the motion to compel, the District Court recognized "the seriousness of its finding that Defendant Mohawk has waived the attorney-client privilege" and observed that Mohawk "understandably, likely will wish to appeal from this Order." Pet. App. 52a. The District Court further observed that appealing the order as interlocutory under 28 U.S.C. § 1292(b) would not necessarily be appropriate, but suggested that Mohawk may have other available avenues to appeal, such as appealing under the collateral order doctrine or a petition for mandamus. *Id.* The District Court then stayed the deadline for Mohawk to produce documents and supplement its discovery responses in the event that Mohawk chose to appeal. *Id.*

Mohawk filed both an appeal and a petition for writ of mandamus with the Court of Appeals for the Eleventh Circuit, seeking reversal of the District Court's order finding waiver and compelling the disclosure of privileged information. In its appeal, Mohawk urged the Eleventh Circuit to join the Third, Ninth, and D.C. Circuits, each of which has held that orders compelling the disclosure of information claimed to be protected by the attorney-client privilege are immediately appealable under the collateral order doctrine. *UMG Recording, Inc. v. Bertelsmann AG (In re Napster, Inc. Copyright Litig.)*, 479 F.3d 1078, 1087-88 (9th Cir. 2007) (holding that appellate jurisdiction was appropriate under the collateral order doctrine to review whether attorney-client privilege was lost under the crime-fraud exception); *United States v. Philip Morris Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003) (exercising jurisdiction under the collateral order doctrine to review the district court's order finding waiver of the attorney-client privilege); *Kelly v. Ford Motor Co., (In re Ford Motor Co.)*, 110 F.3d 954 (3rd Cir. 1997) (exercising collateral order jurisdiction over an appeal of a district court's order to produce attorney-client privileged documents).

The Eleventh Circuit dismissed Mohawk's appeal, holding that "the challenged discovery order is not an appealable order under *Cohen*." Pet. App. 10a. The court determined that the challenged order met the first two prongs of the three-part *Cohen* test because the order: (i) conclusively determined the disputed question and; (ii) resolved an important issue completely separate from the merits of the action. *Id.* at 8a. The court concluded, however, that the order failed to satisfy the third prong of the *Cohen* test because the court was unable to "find that a discovery order that implicates the attorney-client privilege is effectively unreviewable on appeal." *Id.*[2]

The Eleventh Circuit granted Mohawk's motion to stay the issuance of the mandate pending the filing of Mohawk's Petition for a Writ of Certiorari, which this Court granted on January 26, 2009.

## SUMMARY OF ARGUMENT

The Court should hold that, under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a party can immediately appeal a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information. Such an order not only satisfies the traditional three-part test established by this Court for collateral order jurisdiction, but also presents an issue that is sufficiently important to merit collateral order review. The attorney-client privilege lies at the heart of our adversary system, promotes loyalty and trust between attorney and client, and advances the broader public interests in the observance of law and administration of justice. Because the attorney-client privilege is deeply rooted in public policy and essential to achieving a healthy legal system, a district court order that compromises the privilege by compelling the disclosure of privileged information threatens rights critical to the public good and is sufficiently important to warrant collateral order jurisdiction, outweighing the traditional concerns against piecemeal appeals. The Eleventh Circuit thus erred in dismissing Mohawk's appeal of the District Court's order finding waiver and compelling the disclosure of privileged information.

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[2] The Eleventh Circuit also denied Mohawk's petition for writ of mandamus because it found that Mohawk did not demonstrate that "its right to issuance of the writ is 'clear and indisputable.'" Pet. App. 2a.

In *Cohen*, the Court construed the "final decision" rule encompassed in 28 U.S.C. § 1291 to allow immediate appeals for that small class of pre-judgment orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. A pre-judgment order is appealable under the collateral order doctrine if it: (i) conclusively determines the disputed question; (ii) resolves an important issue completely separate from the merits of the action; and (iii) is effectively unreviewable on appeal from final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Analysis of these three criteria serves to identify those classes of orders in which the considerations that favor immediate appeal outweigh the traditional concerns against interlocutory review. Whether an order is immediately appealable under *Cohen* boils down to a value judgment as to whether the right at issue is sufficiently important to overcome the policies militating against interlocutory appeals. *Will v. Hallock*, 546 U.S. 345, 351-52 (2006).

The District Court's order finding waiver and compelling Mohawk to produce privileged information satisfies each of the *Cohen* factors and concerns a right sufficiently important to merit collateral order jurisdiction. First, the District Court's order conclusively determined the disputed question, as the order leaves no room for further consideration about whether the information at issue is protected by the attorney-client privilege or whether it should be disclosed in the lawsuit.

Second, the District Court's order resolves an important issue that is separate from the merits of the underlying lawsuit. Indeed, the attorney-client privilege has long been recognized as essential not only to the vigorous and effective representation of clients by attorneys, but also to the administration of our system of public justice. The District Court's finding of waiver, moreover, is entirely separate from the merits of the underlying action because the court of appeals can resolve the privilege and waiver issues without deciding or even addressing the merits of the underlying case.

Third, the finding of waiver is effectively unreviewable on appeal from a final judgment. If Mohawk is required to wait until after a final judgment to appeal the District Court's order, the right Mohawk seeks to protect, namely, the right not to disclose privileged information, will have been destroyed. It is this right of non-disclosure that is at the heart of the attorney-client privilege, and as the Third, Ninth, and D.C. Circuits have recognized, an appeal after final judgment cannot remedy the breach of confidentiality occasioned by erroneous disclosure of privileged material. *See In re Napster*, 479 F.3d at 1088; *Philip Morris*, 314 F.3d at 619; *In re Ford*, 110 F.3d at 963. Once the privileged information is disclosed, "there is no way to unscramble the egg scrambled by the disclosure." *In re Ford*, 110 F.3d at 963.

Moreover, the traditional interests protected by the attorney-client privilege are sufficiently important to outweigh the interests in delaying appellate review until after final judgment. Undoubtedly, the attorney-client privilege is essential to our judicial system, and the Court has previously held that collateral order jurisdiction exists with respect to orders involving issues of arguably less importance. For instance, in *Cohen* itself the Court held that an order refusing to apply a state statute requiring a plaintiff in a stockholder derivative action to post a bond was immediately appealable under the collateral order doctrine. The Court has likewise held that collateral order jurisdiction exists to review, for example, orders: (i) vacating attachment of a vessel in an admiralty action; (ii) denying reduced bail; (iii) imposing notice costs on a defendant in a class action; and (iv) allocating to defendants $16,000 of expenses for identifying class members. Collateral order jurisdiction should also exist to review an order impacting a right of arguably greater significance – the right of non-disclosure encompassed in the attorney-client privilege.

The alternative avenues to appellate review identified by the Eleventh Circuit and other circuit courts provide no basis for refusing collateral order jurisdiction. In this regard, neither the option of intentionally violating a federal court order nor mandamus are substitutes for collateral order review; nor are they practical or efficient means to preserve the protections afforded by the attorney-client privilege.

Setting aside the policy implications of encouraging parties and counsel to willfully violate federal court orders, the "disobedience and contempt" avenue is fraught with uncertainty. A party may seek an immediate appeal of an order of contempt only if the sanction is criminal in nature. *See, e.g., Fox v. Capital Co.*, 299 U.S. 105, 107 (1936). Because of the broad discretion of a district court to sanction the refusal to comply with a court order by civil contempt or other means that cannot be appealed until a final judgment is entered, there is no reasonable manner to predict whether a party will receive a criminal contempt citation if it refuses to comply with an order compelling the disclosure of information protected by the attorney-client privilege. Indeed, it would be the extraordinary case where a district court would go so far as to hold a party in criminal contempt for refusing to comply with such an order. And, in any event, a party should not have to subject itself to the consequences of criminal contempt in order to preserve the protections afforded by the attorney-client privilege. Likewise, it is well-settled that mandamus is not "the appropriate vehicle" for vindicating a right when collateral order review is available. *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979). Moreover, mandamus unquestionably imposes a significantly limited standard of review and is no substitute for the more sifting review of an immediate appeal.

Finally, allowing collateral order review in this context will not give rise to a flood of interlocutory appeals. There is simply no evidence to support any "floodgates" argument on the question presented. To the contrary, the available evidence shows that the three circuits that have allowed collateral order review of orders compelling the disclosure of information claimed to be subject to the attorney-client privilege have dealt with a total of approximately eleven such appeals since 1997. Of these appeals, only three fell into the category at issue here in which the district court compelled the disclosure of privileged information based on a finding of waiver of the attorney-client privilege.

## ARGUMENT

### I. The Collateral Order Doctrine Permits Immediate Appeals of Certain Categories of Pre-Judgment Orders.

28 U.S.C. § 1291 provides that the courts of appeals are vested with "jurisdiction of appeals from all final decisions of the district courts . . . ." In *Cohen* and subsequent cases, this Court has construed Section 1291 to treat as final and permit immediate appeal from a small class of district court decisions made prior to final judgment.

*Cohen* was a shareholder derivative action in which the district court refused to apply a state statute requiring a plaintiff to post security for fees and expenses for which they could potentially be held liable. After the district court's decision was reversed on interlocutory appeal, this Court held that jurisdiction over the appeal was proper pursuant to Section 1291 because the district court's decision fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

The collateral order doctrine articulated in *Cohen* "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen*, 337 U.S. at 546). Section 1291 thus "entitles a party to appeal not only from a district court decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment,' but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of 'achieving a healthy legal system,' nonetheless be treated as 'final.'" *Id.* at 867 (internal citations omitted).

Since *Cohen*, the Court has reaffirmed the collateral order doctrine in a variety of contexts and now applies three well-established criteria to determine if collateral order jurisdiction exists. To be immediately appealable as a collateral order, a district court's order must: (i) conclusively determine the disputed question; (ii) resolve an important issue completely separate from the merits of the action; and (iii) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand*, 437 U.S. at 468.

These requirements "help qualify for immediate appeal classes of orders in which the considerations that favor immediate appeals seem comparatively strong and those that disfavor such appeals seem comparatively weak." *Johnson v. Jones*, 515 U.S. 304, 311 (1995). Central to this analysis is a determination of the importance of the legal right at issue. Indeed, the decision of whether to allow an immediate appeal "boils down to 'a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.'" *Will*, 546 U.S. at 351-52. Collateral order jurisdiction exists if the right to be vindicated is sufficiently important to overcome the policies weighing against interlocutory appeals. *See Digital Equip.*, 511 U.S. at 879 (recognizing that a right "qualifies as 'important' in *Cohen's* sense," if the interests protected by the right are "weightier than the societal interests advanced by the ordinary operation of final judgment principles"); *see also Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring) (reasoning that the collateral order doctrine did not apply because the right to be vindicated "is not sufficiently important to overcome the policies militating against interlocutory appeals"). This determination, however, is made for the entire category of cases to which a claim belongs and not on a case-by-case basis. *Digital Equip.*, 511 U.S. at 868.

## II. The District Court's Order Finding Waiver of the Attorney-Client Privilege and Compelling Disclosure of Privileged Information Is Immediately Appealable Under the Collateral Order Doctrine.

Consistent with the well-reasoned holdings of the Third, Ninth, and D.C. Circuits, an immediate appeal should be allowed in this case because district court orders finding waiver of the attorney-client privilege and compelling the disclosure of privileged information satisfy each of the *Cohen* factors and threaten a sufficiently important right.[3]

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[3] As noted in the Petition for a Writ of Certiorari, six circuit courts of appeals (prior to this case) are in conflict with the Third, Ninth and D.C. Circuits, and have held that a discovery order involving the attorney-client privilege is not appealable under the collateral order doctrine. *FDIC v. Ogden Corp.*, 202 F.3d 454, 458, 459 n.2 (1st Cir. 2000)("discovery orders generally are not thought to come within [the collateral order doctrine]"; a "perfect example of a discovery order that is not immediately appealable" under the collateral order doctrine is one involving a party's claim of attorney-client privilege); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993) (declining jurisdiction); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993)(order requiring plaintiff to produce certain documents that it claimed were subject to attorney-client privilege was not immediately appealable under the collateral order doctrine); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir. 1992) (holding that discovery orders are not appealable under the collateral order doctrine); *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992) ("orders to produce information over strong objections based on privilege are not appealable"); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991) (order compelling discovery of attorney opinion letters was not immediately appealable under the collateral order doctrine).

### A. The District Court's Order Conclusively Determined the Disputed Question.

The first requirement for collateral order jurisdiction is that the district court's order conclusively determine the disputed question. *Sell v. United States*, 539 U.S. 166, 176 (2003). This criteria is satisfied when the order constitutes a complete, formal, and final ruling by the trial court on the right at issue. *Abney v. United States*, 431 U.S. 651, 659 (1977). As the Eleventh Circuit recognized, this criteria is satisfied here because the District Court's order finding waiver and compelling Mohawk to disclose privileged information is a final ruling on the attorney-client privilege issue and the challenged order "leaves no room for the district court to further consider whether the information at issue is protected." Pet. App. 8a.

### B. The District Court's Order Resolved an Important Issue that is Separate from the Merits.

The Eleventh Circuit also recognized that the second *Cohen* criteria – that the disputed order must resolve an important issue that is completely separate from the merits of the dispute – was satisfied. Pet. App. 8a. This factor has two components: importance and separateness. Both are satisfied here.

### 1. The Propriety of an Order Finding Waiver of the Attorney-Client Privilege and Compelling Disclosure of Privileged Information is an Important Issue.

It is well-settled that the attorney-client privilege plays an essential and foundational role in the American legal system. Indeed, "[i]t is often stated that the attorney-client privilege is at the heart of the adversary system; its purpose is to support that system by promoting loyalty and trust between an attorney and a client." *In re Ford*, 110 F.3d at 961. Every jurisdiction in the country recognizes the attorney-client privilege and this Court has emphasized the importance of the privilege as a means to advance the "broader public interests in the observance of law and administration of justice." *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). In our representational system, fostering open and frank communication between attorney and client is paramount not only to the vigorous and effective representation of the client's interest, but also to the administration of our system of public justice. *See Upjohn*, 449 U.S. at 389.

Given the fundamental significance of the attorney-client privilege to the judicial system, the District Court's order finding waiver and compelling Mohawk to produce privileged information resolved an important issue. Moreover, as discussed below, the attorney-client privilege issue resolved by the District Court's order is not only important in a general sense, but is also sufficiently important to outweigh the policies militating against interlocutory appeals.

### 2. The Privilege Issue Is Separate From the Merits.

The issue on appeal must also be separate from the merits of the underlying case. *See Sell*, 539 U.S. at 176. In this context, separateness means an appeal that involves "'a claimed right which is not an ingredient of the cause of action and does not require consideration with it.'" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974). In *Van Cauwenberghe v. Biard*, 486 U.S 517 (1988), this Court explained that "the requirement that the order be completely separate from the merits is a distillation of the principle that there should not be piecemeal review of steps towards final judgment in which they will merge." 486 U.S. at 527-28 (internal quotations omitted). The Court further explained that "[a]llowing appeals from interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case." *Id.*

The issue of whether Mohawk waived the attorney-client privilege is separate from the merits of the case. Carpenter claims primarily that Mohawk engaged in a conspiracy, threatened him, and ultimately fired him to deter him from testifying in another lawsuit, in violation of 42 U.S.C. § 1985(2). *See* J.A. 49a. The District Court's finding on waiver, however, was based entirely on three sentences contained in a brief Mohawk filed in another case and had nothing to with the merits of the claims asserted in Carpenter's Amended Complaint. The Eleventh Circuit agreed that the separateness requirement was satisfied, ruling that it could "resolve the privilege issues (*i.e.*, whether [Mohawk] must produce the disputed documents and communications) without deciding the merits of the case." Pet. App. 8a. Plainly, the court of appeals can determine whether the statements made by Mohawk in the *Williams* case constituted a waiver of the privilege without ever touching the merits of Carpenter's claims in this case. *See Philip Morris*, 314 F.3d at 617 (holding that privilege issue arising out of district court order finding waiver of the attorney-client privilege was "clearly" separable from the merits of the underlying case). As such, there is no danger that allowing Mohawk to proceed with its appeal now will waste judicial resources by requiring repetitive review of substantive questions in this case.

Arguing against collateral order jurisdiction, Carpenter has already asserted that the separateness requirement is not satisfied here because "discovery orders generally (and particularly ones addressing the doctrine of implied waiver of a privilege) are not completely separate from but instead inextricably intertwined with the merits of the action." Response to Petition, p. 25. Carpenter's contentions are flawed in multiple respects. First, this case is not about whether "discovery orders generally" are immediately appealable as collateral orders. Instead, the category of cases at issue in this appeal includes only those cases in which a district court orders the disclosure of privileged information after finding waiver of the attorney-client privilege.

Second, Carpenter's position appears to be that questions of implied waiver are always intertwined with the merits because they might require a court to consider the plaintiff's factual allegations (without determining their merit) in resolving the waiver issue. This argument not only fails on the facts of this case, where the alleged waiver took place by statements made in another case, but ignores that this Court has specifically rejected the notion that the presence of *any* factual overlap defeats collateral order jurisdiction. *Mitchell v. Forsyth*, 472 U.S. 511, 529 n.10 (1985). Indeed, in *Mitchell*, the Court specifically "recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." *Id.* at 528-29.

### C. The District Court's Order is Effectively Unreviewable after Final Judgment.

The final *Cohen* criterion requires that the underlying order be "'effectively unreviewable on appeal from a final judgment.'" *See Sell*, 539 U.S. at 176. An order is "effectively unreviewable" if it affects "rights that will be *irretrievably lost* in the absence of an immediate appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985) (emphasis added). In *United States v. MacDonald*, 435 U.S. 850 (1978), this Court noted that a claim is effectively unreviewable on appeal when it involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." 435 U.S. at 860. More recently, the Court has explained that "the requirement that the issue underlying the order be 'effectively unreviewable' later on, for example, means that failure to review immediately may well cause significant harm." *Johnson*, 515 U.S. at 311.

In this case, the right Mohawk seeks to vindicate will be irreparably destroyed absent immediate appeal. At its core, the attorney-client privilege provides a right not to disclose privileged information. *See Hunt*, 128 U.S. at 470 (acknowledging that the attorney-client privilege arises from "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); *In re Ford*, 110 F.3d at 963 ("[U]nderlying the attorney-client privilege is the policy of encouraging full and frank communications between an attorney and client, *without the fear of disclosure*, so as to aid in the administration of justice.") (emphasis added). Once information subject to the attorney-client privilege is disclosed, this right of non-disclosure is lost forever and cannot be repaired. *See Philip Morris*, 314 F.3d at 619 ("In this case, the right sought to be protected – BATCo's privilege – would be destroyed if interlocutory appeal is not allowed."); *see also In re Ford*, 110 F.3d at 963 (holding that "once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed.").

This is plainly true in the present case, as once Mohawk discloses the information at issue, it will irretrievably lose the protections afforded by the attorney-client privilege. Carpenter and his lawyers will have enjoyed the opportunity to review and consider the privileged communications and the legal impressions of its adversary's counsel. Indeed, for any litigant, there could hardly be any worse recipient of attorney-client privileged information than his adversary. This information could not be effectively recovered on appeal from a final judgment, since there is no way to force Carpenter and his counsel to forget what they learned from the privileged communications. *See In re Ford*, 110 F.3d at 963 ("'[A]ttorneys cannot unlearn what has been disclosed to them in discovery'; they are likely to use such material for evidentiary leads, strategy decisions, or the like.").

The predicament faced by Mohawk is illustrated in this Court's decision in *Sell*. There, the Court held that a district court's pretrial order requiring a defendant to involuntarily receive medication in order to render him competent to stand trial was immediately appealable as a collateral order. *See* 539 U.S. at 176-77. The Court determined that the issue was effectively unreviewable on appeal from final judgment because by the time of trial, the defendant would have undergone the forced medication, the very harm that he sought to avoid. *Id.* This harm, the Court recognized, could not be undone even if the defendant was acquitted. *Id.* at 177. Indeed, if he were to be acquitted, there would be no appeal through which he could obtain review. *Id.* at 176-177.

The same is true for Mohawk in this case. Absent immediate appeal, by the time of trial, Mohawk will have suffered the very harm it seeks to avoid—the disclosure of privileged information. Moreover, even if Mohawk were to prevail at trial, there would be no appeal through which Mohawk might obtain review and remedy the District Court's order.

In finding that the third *Cohen* criteria is not satisfied here, the Eleventh Circuit reasoned that any error by the District Court could be adequately remedied after final judgment by requiring a new trial. According to the Eleventh Circuit, if it "were [determined] on appeal from a final judgment that privileged information was wrongly turned over and was used to the detriment of the party asserting the privilege, we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information." Pet. App. 8a-9a. This rationale, which has been adopted by the Tenth Circuit, *see Boughton*, 10 F.3d at 749, misses the mark.

A post-judgment appeal resulting in a reversal and a new trial would be manifestly useless in vindicating the right against disclosure that Mohawk seeks to protect, since by that point, "the cat is already out of the bag" and there is "no way to unscramble the egg scrambled by the disclosure[.]" *In re Ford*, 110 F.3d at 963. While the Eleventh and Tenth Circuits correctly recognize the harm occasioned by the improper use of privileged information at trial, these courts fail to recognize that the attorney-client privilege is not simply an evidentiary privilege that prohibits use of protected information at trial. Rather, when properly invoked, the privilege provides an absolute right not to disclose the privileged information in the first place.

Violation of this non-disclosure right causes harm beyond the use of privileged information at trial that simply cannot be remedied through a new trial. While privileged communications often contain facts – facts the opposing party has alternative avenues to discover – attorney-client communications also contain the attorney's legal conclusions and litigation strategies. These mental impressions cannot be recovered on appeal after disclosure and final judgment; nor can the harm occasioned by their improper disclosure be undone. Thus, without interlocutory appeal, an erroneous finding of waiver will allow opposing counsel to proceed using mental impressions and litigation strategy borrowed from their adversary.

Additionally, the disclosed information may be sought in connection with other litigation, thereby causing additional harm that extends beyond the present case that could likewise never be addressed in a post-judgment appeal. This plain reality is true in many cases, as the complaining party will have no avenue to resist later discovery of the same privileged information during the pendency of their case. Further, there will be no meaningful mechanism for the trial court to protect against such occurrences, having already ruled that the privilege will not prevent discovery of such information. During the pendency of the case and before appellate review, the trial court's mistaken order leaves the door open for intrusion by others. After such intrusion, there is no adequate remedy in the initial case, much less the related or unrelated cases that have also invaded the privilege domain.

The risk of such additional harm is readily illustrated in this case due to the *Williams* plaintiffs' previous attempt to obtain the privileged information at issue. Absent an immediate appeal, the information will likely be disclosed to the *Williams* plaintiffs as discovery proceeds in their case. In addition, the privileged information would in all likelihood be disclosed during the course of a public trial, or potentially in media reports or to other third parties, making it all the more clear that the privilege could never be fully retrieved. *See Philip Morris*, 314 F.3d at 619 ("By that point, the entirety of the [privileged memorandum] will have been disclosed to third parties, making the issue of privilege effectively moot.").

### D. The Right to Be Vindicated Is Sufficiently Important to Warrant Immediate Appeal.

Because the District Court's order satisfies each of the *Cohen* factors, the decision then "boils down" to a value judgment as to whether the right to be vindicated is sufficiently important to outweigh the considerations against piecemeal appeals. *Will*, 546 U.S. at 351-52; *Digital Equip.*, 511 U.S. at 878-79. This Court's prior opinions concerning the attorney-client privilege and the collateral order doctrine demonstrate that an issue as to the propriety of the compelled disclosure of otherwise privileged information is sufficiently important to merit collateral order review.

The attorney-client privilege is "one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn*, 449 U.S. at 389. The Court has long acknowledged that the attorney-client privilege arises from "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt*, 128 U.S. at 470; *Blackburn v. Crawfords Lessee*, 3 Wall. (70 U.S.) 175, 192-93 (1865) ("'If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case.'").

The importance of the attorney-client privilege, though, is founded on more than just its historical role in the American legal system. The privilege is based on a strong public policy that recognizes "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *See Upjohn*, 449 U.S. at 389. The strength of the policy supporting the attorney-client privilege is demonstrated by the fact that the privilege, by its very nature, will often prevent a litigant from obtaining potentially relevant evidence. Nevertheless, this Court has even refused to soften the posthumous application of the privilege in circumstances where the attorney-client communication could potentially exonerate a criminal defendant. *See Swidler & Berlin*, 524 U.S. at 408-11.

The attorney-client privilege is of increased importance in the context of internal investigations by corporate counsel, such as the investigation Mohawk conducted in this case. Indeed, in *Upjohn*, the Court held that a narrowly defined attorney-client privilege would "threaten[] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." 449 U.S. at 392. In so holding, the Court rejected the government's argument that "civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege." *Id.* at 393 n.2. Instead, the Court reasoned that the government's argument "ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken." *Id.*

Allowing immediate appeals of erroneous findings of waiver will support the policies articulated in *Upjohn.* Absent the possibility of such relief, corporations may be less likely to engage in internal investigations to ensure their compliance with the law because the assurance that the legal findings and conclusions resulting from such investigations could be maintained in confidence would be weakened considerably. At the very least, the quality and depth of such investigations could suffer.

In exercising collateral order jurisdiction over appeals from orders compelling the disclosure of information claimed to be protected by the attorney-client privilege, the Third Circuit properly analyzed the question of importance in the *Cohen* sense. Relying on this Court's prior discussion of the importance criterion, the Third Circuit explained that "[i]mportance has a particular meaning in [the collateral order doctrine] context . . . [and] does not only refer to general jurisprudential importance." *In re Ford*, 110 F.3d at 959.

"Rather, the overarching principle governing 'importance' is that, for the purposes of the *Cohen* test, an issue is important if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *Id.*

Applying this principle, the Third Circuit held that "the interests protected by the attorney-client privilege (which would be eviscerated by forced disclosure of privileged material) [are] sufficiently significant relative to . . . the interests protected by the final judgment rule to satisfy the importance criterion [for collateral order jurisdiction]." *Id.* at 960-61. In this regard, the court noted that the attorney-client privilege is recognized by "every jurisdiction in this nation" and "is one of the pillars that supports the edifice that is our adversary system." *Id.* at 962. The court explained that the purpose of the privilege is to support our adversary system "by promoting loyalty and trust between an attorney and a client." *Id.* at 961. Ultimately, the Third Circuit correctly concluded that these interests served by the attorney-client privilege were "of sufficient importance that the danger of denying justice by delay in appellate adjudication . . . outweighs the inefficiencies introduced by immediate appeal." *Id.* at 962.

Notably, this Court has permitted collateral order jurisdiction in cases implicating other arguably less important, less entrenched legal rights. The original *Cohen* case stemmed from a district court's order refusing to apply a state statute requiring a plaintiff to post security for costs. *See Cohen*, 337 U.S. at 546. The Court has similarly permitted collateral order jurisdiction in other contexts that do not present issues as central and fundamental to our legal system as the attorney-client privilege. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) (allowing appeal under the collateral order doctrine of a district court order allocating to defendants in a class action the costs and expense of identifying class members); *Eisen*, 417 U.S. 156 (allowing collateral order review of a district court order imposing costs of notice on the defendant in a class action); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (allowing an appeal under the collateral order doctrine of an order staying an action pending resolution of a previously filed state court action); *Stack v. Boyle*, 342 U.S. 1 (1951) (allowing an appeal under the collateral order doctrine of an order denying reduced bail); *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684 (1950) (allowing appeal under the collateral order doctrine of an order vacating attachment of a vessel in an admiralty action). While the rights implicated in these cases are of undoubted importance, there should be little question that the non-disclosure rights arising out of the attorney-client privilege are, at the very least, of equal importance and thus subject to appeal under the collateral order doctrine.

## III. Alternative Avenues for Review Are Inadequate and Do Not Provide a Basis for Refusing Collateral Order Jurisdiction.

In dismissing Mohawk's appeal, the Eleventh Circuit noted that "there are other possible avenues for immediate review" available to Mohawk. Specifically, the court suggested that Mohawk could simply refuse to comply with the District Court's order and contest its validity if subsequently cited for contempt. Pet. App. 9a, 13a. The Eleventh Circuit also conjectured that the potential option of "mandamus is often an appropriate method of review of orders compelling discovery." Pet App. 11a. Neither of these options is a likely or efficient way to preserve the protections afforded by the attorney-client privilege; nor do they provide any basis for refusing collateral order jurisdiction.

### A. Disobedience and Contempt is Not an Adequate Alternative to Collateral Order Review.

The first approach proposed by the Eleventh Circuit is commonly referred to as the "'disobedience and contempt' requirement." *See Behrens v. Pelletier*, 516 U.S. 299, 319 (1996) (Breyer, J., dissenting). In the past, this Court has "generally denied review of pretrial discovery orders" under the rationale that when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981). The Court has noted, however, that "[t]he requirement of submitting to contempt . . . is not without exception and in some instances the purposes underlying the finality rule require a different result." *United States v. Nixon*, 418 U.S. 683, 691 (1974).

Although this Court has never addressed the issue, some courts of appeals have proffered the same approach as the Eleventh Circuit and rejected collateral order review of orders compelling the production of attorney-client privileged information, suggesting that a party should instead refuse to comply with the order and then seek review of the resulting contempt sanction. For instance, in *Ogden*, the First Circuit explained its view that:

> One reason that most discovery orders do not fall within the collateral order exception is because they do not meet the "otherwise effectively unreviewable" requirement; the party resisting the discovery order "can gain the right of appeal . . . by defying it, being held in contempt, and then appealing from the contempt order, which would be a final judgment as to [him]."

202 F.3d at 459. Similarly, in *United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, the Sixth Circuit stated that "discovery orders are generally not appealable under the collateral order doctrine" and that "to obtain review from this court, a complaining party must disobey the discovery order and incur an appealable contempt citation if that party is able to do so." 444 F.3d 462, 472 (6th Cir. 2006). There are a number of fundamental problems with this approach.

First, contempt is not an adequate avenue through which to obtain effective appellate review because it is highly unpredictable and not always an available avenue to appeal. While a party may seek an immediate appeal of a finding of criminal contempt, an immediate appeal may not be had from a finding of civil contempt. *See, e.g.*, *Fox*, 299 U.S. at 107 ("The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt."); *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 976 (11th Cir. 1986) (noting that "[g]enerally a finding of civil contempt is not reviewable on interlocutory appeal"). There is no reasonable manner to predict that a party will receive a criminal contempt citation, however, as a district court is free to sanction defiance of its orders by civil contempt, by the striking of pleadings, or by other means that cannot be appealed until a final judgment is entered. Indeed, given the various alternative options available to the district courts, it would seem to be only the exceptional case in which criminal contempt would result from a party's failure to produce privileged information. It is this uncertainty that explains the Eleventh Circuit's emphasis that another avenue of appeal "*may* exist" if the party challenging the discovery order refuses to comply with the order. Pet. App. 13a.

Thus, forcing a party seeking to protect lawful and important rights to gamble that a court will impose the appropriate kind of sanction fails to afford the party a reliable means of appeal:

> [T]he disobedience and contempt route to appeal cannot be labeled an adequate means

> of relief for a party-litigant. . . . Petitioner cannot know, *ex ante*, whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order. The uncertainty of this means to relief bespeaks its inadequacy in this case.

*In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998). As Wright & Miller have aptly stated:

> Several circuits have ruled that the party resisting discovery should disobey the order and be held in contempt. But a civil contempt order against a party is not appealable before final judgment, and for that matter there is no assurance that the sanction would be contempt rather than some other order. Disobedience is not a satisfactory alternative path to appeal.

15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.23 n.6 (2d ed. Supp. 2009).

Second, the policy of the federal courts should not be to encourage intentional disobedience of court orders in order to protect the attorney-client privilege. Since appeal is possible only following a criminal contempt citation, the disobedience and contempt approach would require a party not simply to risk, but to affirmatively seek, criminal penalties in order to vindicate its rights afforded by the attorney-client privilege. As described by the Second Circuit, this is a "barbaric" means for litigants to protect the sanctity of the attorney-client privilege:

> At the outset we reject the suggestion that an appeal can properly come before us only if [Petitioner] refuses to deliver the 1,200 documents, subjects himself to the consequences of contempt, and appeals from the contempt judgment. The law today must be more ingenious, flexible and resourceful in its ability to avoid any such old-fashioned and semi-barbaric procedure.

*Int'l Bus. Machs. Corp. v. United States*, 471 F.2d 507, 511 (2nd Cir. 1972), *vacated on other grounds*, 480 F.2d 293 (2d Cir. 1973) (*en banc*). Awaiting a contempt citation is an unrealistic, impractical, and unnecessarily risky method of obtaining appellate review, particularly to protect the critical rights encompassed in the attorney-client privilege.[4]

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[4] The analysis of the First Circuit in *Ogden* and other similar cases is further flawed because it essentially re-writes the third *Cohen* prong that the underlying order be "'effectively unreviewable on appeal from a final judgment.'" *See Sell*, 539 U.S. at 176. In *Ogden*, the First Circuit reasoned that the third prong is not satisfied by discovery orders compelling the disclosure of privileged information because the availability of the disobedience and contempt option means that the orders "do not meet the 'otherwise effectively unreviewable' requirement." 202 F.3d at 459. This reasoning, however, twists the analysis to be applied under the third prong. The proper analysis focuses not on whether review may be had through some other means, but instead whether effective review may be had on appeal from a final judgment in the underlying case. Thus, the purported availability of another means to review through disobedience and contempt does not preclude collateral order jurisdiction.

### B. Mandamus Is Not an Adequate Alternative to Collateral Order Review.

Many circuit courts have indicated that mandamus, as opposed to collateral order review, is the proper avenue for review of discovery orders compelling production of information over a claim of privilege. *See e.g.*, Pet App. 11a; *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568 (5th Cir. 2006) (stating that "[m]andamus is appropriate if the district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal"); *Chase Manhattan Bank*, 964 F.2d at 163 (rejecting the application of the collateral order doctrine in an appeal from a discovery order that required disclosure of documents claimed to be protected by the attorney-client privilege, and instead, overturning the discovery order through a writ of mandamus). The ability to file a petition for a writ of mandamus, however, does not prevent the exercise of collateral order jurisdiction. Rather, it is the very existence of collateral order jurisdiction that precludes mandamus as an appropriate remedy. *See Helstoski*, 442 U.S. at 506-08 (holding that mandamus is not "the appropriate vehicle" for vindicating a given right when an appeal may be had pursuant to the collateral order doctrine).

In *Helstoski*, the Court explained that the "'general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it*. It lies only when there is practically *no other remedy*.'" *Id.* at 505. Based on this principle, the Court held that mandamus was not an available remedy to the petitioner because he could have pursued an appeal under the collateral order doctrine. *Id.* at 505-08. Therefore, mandamus is neither an alternative to nor substitute for collateral order review and provides no basis for rejecting collateral order jurisdiction.

Mandamus is an inadequate alternative to collateral order jurisdiction for the additional reason that it imposes a significantly limited standard of review. "[O]nly 'exceptional circumstances amounting to a judicial "usurpation of power"' will justify issuance of the writ" and "the party seeking mandamus has the 'burden of showing that its right to issuance of the writ is "clear and indisputable."'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967) and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). As a result, even palpably erroneous rulings that a party waived the attorney-client privilege can be left unremedied via a cursory analysis based on the "stringent standard" for mandamus. *Id.* at 289; *see also Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 (1978) (plurality opinion) ("Although the District Court's exercise of its discretion may be subject to review and modification in a proper interlocutory appeal, we are convinced that it ought not to be overridden by a writ of mandamus"). Thus, as occurred in this case, mandamus will not correct the error by the District Court, resulting in the irretrievable disclosure of privileged communications.

## IV. Allowing Collateral Order Review Will Not Give Rise to a Flood of Interlocutory Appeals.

The Eleventh Circuit expressed the view that utilizing the writ of mandamus is preferable to collateral order jurisdiction for the very reason that it "places a higher burden on the challenging party than a direct appeal." Pet. App. 13a. The Eleventh Circuit's rationale is that a higher standard of review is preferable simply to reduce the high volume of appeals the court presumed would arise out of Mohawk's proposed application of the collateral order doctrine. *Id.* This "floodgates" argument has been seized upon by other appellate courts rejecting collateral order review in this context. *See, e.g., Quantum Corp.*, 940 F.2d at 644 n.2 (stating that if discovery orders involving privilege were appealable before trial, "a flood of piecemeal appeals would undoubtedly ensue").

The Eleventh Circuit apparently believed that application of the collateral order doctrine to Mohawk's narrow appeal will more generally permit interlocutory appeals of all "discovery orders involving claims of privilege." Pet. App. 13a. This case, however, is not and has never been about all claims of privilege. Rather, the narrow category at issue here includes only those cases in which a party seeks to appeal a district court order finding waiver of the attorney-client privilege and requiring the disclosure of information protected by that privilege. Other privileges that might be deemed less important to our system of justice than the attorney-client privilege are not at issue in this case. Moreover, this category does not include appeals of district court orders that do not require the disclosure of privileged information.

In any event, there is no evidence to support any "floodgates" argument on the question presented. Indeed, a review of the opinions published in the Federal Reporter and those included in the Federal Appendix from the three circuits that have recognized collateral order jurisdiction in this context (the Third, Ninth, and D.C. Circuits) reveals that since *In re Ford* was decided in 1997, these circuits have exercised collateral order jurisdiction in a total of approximately eleven appeals in which the appellant sought immediate review of an order compelling a party to disclose information protected by the attorney-client privilege. *Montgomery County v. MicroVote Corp.*, 175 F.3d 296 (3d Cir. 1999); *United States v. Legal Servs. for N.Y. City*, 249 F.3d 1077 (D.C. Cir. 2001); *Philip Morris*, 314 F.3d 612; *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C.*, 57 F. App'x 58 (3d Cir. 2003); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658 (3d Cir. 2003); *Alvarez v. Woodford*, 81 F. App'x 119 (9th Cir. 2003); *United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884 (D.C. Cir. 2004); *In re Napster*, 479 F.3d 1078; *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007); *Newman v. Gen. Motors Corp.*, 228 F. App'x 245 (3d Cir. 2007); *Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.)*, 493 F.3d 345 (3d Cir. 2007). Of these appeals, only three fell into the category at issue here, in which the district court order compelling the disclosure of privileged information was based on a finding of waiver of the attorney-client privilege. *Philip Morris*, 314 F.3d 612; *British Am. Tobacco*, 387 F.3d 884; *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345. There simply is no evidence to support the alleged potential flood of interlocutory appeals.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Eleventh Circuit Court of Appeals dismissing Mohawk's appeal and hold that, under the collateral order doctrine established in *Cohen*, a party can immediately appeal a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information.

Respectfully submitted,

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# RESPONDENT'S BRIEF

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IN THE

# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,
*Petitioner,*
*v.*
NORMAN CARPENTER,
*Respondent.*

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

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## QUESTION PRESENTED

Are pretrial discovery orders denying claims of attorney-client privilege immediately appealable as “final decisions” under 28 U.S.C. § 1291?

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## STATEMENT OF THE CASE

In this case, respondent Norman Carpenter alleges that his former employer, petitioner Mohawk Industries, Inc., conspired with others to intimidate him from giving truthful testimony in a pending class action, in violation of 42 U.S.C. § 1985(2) and state law.

In pretrial discovery proceedings, the district court issued a 59-page order holding that certain communications between Mohawk and its outside counsel were protected by the attorney-client privilege, but that the privilege had been waived with respect to those communications because Mohawk deliberately put them at issue in the litigation. The Eleventh Circuit dismissed Mohawk's appeal on the ground that the district court's ruling was not an appealable collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and that mandamus was unwarranted.

### A. Facts and Background

In June 2006, Mohawk, a manufacturer of flooring materials, hired Carpenter as a salaried shift supervisor at its Union Grove Road facility in Calhoun, Georgia. Joint Appendix (JA) 24a. Carpenter supervised a number of "temporary" workers, *id.* 55a, employed through outside companies that provided the workers to Mohawk. *Id.* 83a.

In November 2006, in the course of his ordinary duties, Carpenter learned for the first time that most of these temporary Mohawk employees did not have documentation showing that they could work lawfully in the United States. *Id.* 55a-57a. On November 28, 2006, Carpenter sent an email to Becky Hale, an employee in Mohawk's human resources department, relaying this fact. The email said: "Becky, 90% of the people that come through the temp do not have good papers. [T]hats why they come to us that way[.] I can tell you that most of the people working here today here through a temp do not have one of the two things[:] either a GA I.d. [a driver's license] or good papers through the I.N.S. Thanks, Norman." *Id.* 56a.

When he wrote the email, Carpenter did not know that Mohawk was a defendant in a class action lawsuit, *Williams v. Mohawk, Industries, Inc.*, No. 4:04-CV-0003-HLM (N.D. Ga.) ("*Williams*"), pending before the Honorable Harold L. Murphy. *See* JA 84a. *Williams* had been filed two years earlier by a group of current and former hourly Mohawk employees who charged Mohawk with violations of federal and Georgia racketeering laws. The *Williams* plaintiffs alleged that Mohawk conspired unlawfully with a group of independent companies to place undocumented workers at Mohawk in an effort to lower the wages of Mohawk's legal workers. The *Williams* complaint also alleged that Mohawk was engaged in a conspiracy to cover up evidence supporting their allegations. *See id.* 51a-53a (describing *Williams* suit).[1]

Because Carpenter was unaware of the *Williams* lawsuit, he was also unaware that his email concerned evidence potentially relevant to *Williams. Id.* 57a. But Mohawk understood the email's significance. When Carpenter arrived at work on December 4, 2006, a Mohawk employee told him to report immediately to Mohawk's business office to meet with a company lawyer. *Id.* 60a-61a. As directed, Carpenter drove to the office, where he met with Mohawk's outside trial counsel in *Williams*, Juan Morillo, a partner in the Washington, D.C. office of Sidley Austin. Morillo was accompanied by a woman identified as someone from Morillo's law firm who would be taking notes of the interview. *Id.* 61a. During the meeting, Morillo attempted to have Carpenter retract the statements in his email or admit either that he was unsure about the statements' truth or falsity or that they were exaggerations. *Id.* Carpenter refused to do so, and Mohawk fired him the following day. *Id.* 61a-63a.

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[1] In 2006, this Court remanded *Williams* to the Eleventh Circuit in light of *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), which concerned the standards for proving causation in a civil RICO case. *See Mohawk Industries, Inc. v. Williams*, 547 U.S. 516 (2006). The Eleventh Circuit held that the plaintiffs had properly alleged a civil RICO claim. *See Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 549 U.S. 1260 (2007).

On May 28, 2009, the Eleventh Circuit reversed the district court's denial of class certification. *See Williams v. Mohawk Industries, Inc.*, --- F.3d ---, 2009 WL 1476702 (11th Cir. 2009).

## B. Proceedings Below

**1. Carpenter's Suit.** On March 15, 2007, Carpenter sued Mohawk under 42 U.S.C. § 1985(2), which provides a right of action to remedy injuries caused by conspiracies to threaten or intimidate witnesses from providing truthful testimony in any court of the United States. *See* JA 48a. Carpenter also brought claims under Georgia statutory and common law. *Id.* Carpenter alleged that the meeting with Morillo was designed to intimidate him into recanting his report that Mohawk employed undocumented employees and thus to prevent him from testifying truthfully in *Williams*. *Id.* 57a-59a. Carpenter also alleged that Mohawk attempted to deter him from testifying truthfully in *Williams* by terminating his employment and then making a knowingly false accusation that he—and not Mohawk—had been responsible for hiring an unauthorized worker. *Id.* 59a-60a.

**2. Overlap With the *Williams* Class Action.** Carpenter's suit was deemed related to the *Williams* class action and assigned to Judge Murphy. Doc. 1 in *Carpenter* (civil cover sheet). On March 21, 2007, the *Williams* plaintiffs filed an "Emergency Motion For Hearing Regarding Mohawk's Contact With Witnesses," seeking an evidentiary hearing at which Norman Carpenter would testify. *See id.* 206a. Finding that Carpenter "likely ha[d] an interest" in the emergency motion, Judge Murphy issued an order allowing Carpenter's counsel to respond. Doc. 87 in *Williams*, at 3. Moreover, Mohawk filed two briefs in opposition to the emergency hearing, one submitted by Juan Morillo, as Mohawk's counsel in *Williams* case, *id.* 205a-224a, and the other submitted by attorneys at Alston & Bird, Mohawk's counsel in *Carpenter*. Doc. 91 in *Williams*. On April 9, 2007, Judge Murphy denied the *Williams* plaintiffs' motion for an evidentiary hearing without prejudice. He concluded that Carpenter's testimony could be taken in the normal course of discovery. *See* Pet. App. 21a-22a.

**3. Mohawk Places Its "Investigation" of Carpenter At Issue in the Litigation.** In its filings below and in *Williams*, Mohawk made affirmative representations indicating that Morillo had gathered factual information that Mohawk would rely on in its defense in *Carpenter*. Mohawk's opposition to the *Williams* plaintiffs' motion for an evidentiary hearing, filed by Morillo, accused Carpenter of making "wild allegations" amounting to "pure fantasy." JA 208a.

Specifically, Mohawk attacked Carpenter by interjecting what it claimed were "[t]he true facts." *Id.* Mohawk asserted that Carpenter was a "disgruntled former Mohawk employee," *id.* 206a, whose "ludicrous allegations" and "ridiculous version of events," *id.* 206a-207a, amounted to a "sad effort to extort Mohawk." *Id.* 211a. Mohawk further asserted:

> Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct.
>
> * * *
>
> [After Carpenter sent Hale the email], Hale immediately forwarded the email chain to Mohawk management to report Mr. Carpenter's attempt to have an unauthorized worker hired and his assertion that some of the temporary workers under his supervision were unauthorized.
>
> After receiving Ms. Hale's complaint, Mohawk responded in an entirely appropriate manner. It commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.
>
> As a result of Mr. Carpenter's misconduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.

*Id.* 209a-210a.

On May 17, 2007, the parties in *Carpenter* filed a Joint Preliminary Report and Discovery Plan in which Mohawk stated that it would seek an order "limiting discovery and approving appropriate protections related to Plaintiff's anticipated efforts to seek information protected by the attorney-client privilege." *Id.* 104a-105a. On the same date, Mohawk filed its initial discovery disclosures under Federal Rule of Civil Procedure 26(a)(1). Those disclosures identified Morillo, as well as another Sidley Austin employee, Kim Ladd (possibly the note taker during the Carpenter interview), as persons "believed to have discoverable information that Mohawk may use to support its defenses in this matter." *Id.* 113a; *see id.* (referring to exhibit identifying Morillo and Ladd as a "witness list"), 117a (witness list). The following day, Mohawk filed its Answer to Carpenter's First Amended Complaint. *Id.* 135a. Mohawk denied Carpenter's allegations and asserted that Carpenter "knowingly allowed illegal employees to work on his shift." *Id.* 148a.

4. **Attorney-Client Privilege Dispute.** Fact discovery began in *Carpenter* in May 2007. Carpenter sent Mohawk interrogatories and requests for production of documents seeking, among other things, information on Mohawk's "investigation" that, the company asserted, caused it to fire him. In response, Mohawk identified four people involved in the "investigation" of Carpenter, including its attorney, Morillo. *Id.* 174a. Mohawk objected, however, to providing other information, including memos about the Morillo-Carpenter meeting, claiming attorney-client privilege. Pet. App. 32a-36a.

Carpenter moved to compel responses, maintaining that the withheld materials were not privileged and that, even if they were, Mohawk had waived the privilege through its contentions about the "true facts" surrounding Mohawk's treatment of Carpenter and through other filings that had placed Morillo's "investigation" at issue. *See* JA 161a-192a. Meanwhile, Mohawk moved for a protective order on attorney-client privilege grounds. *Id.* 193a. Carpenter responded, as did the *Williams* plaintiffs, whom the district court had also directed to respond as interested parties. *Id.* 196a, 203a-204a.

On October 1, 2007, Judge Murphy granted Carpenter's motion to compel. Pet. App. 51a-52a. In a lengthy opinion, the court held that the information was privileged but that Mohawk had waived the privilege "with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment" because Mohawk's assertions about the merits of Carpenter's claims and its defenses to those claims had "placed the actions of Attorney Morillo in issue." *Id.* 51a. "In fairness, evaluation of those representations," Judge Murphy explained, "will require an examination of otherwise-protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel." *Id.*

**5. Mohawk's Interlocutory Appeal.** Mohawk filed a notice of appeal and a petition for a writ of mandamus to the Eleventh Circuit on October 31, 2007. Carpenter moved to dismiss the appeal for lack of appellate jurisdiction on the ground that the district court's order finding waiver of the attorney-client privilege was not a final decision under 28 U.S.C. § 1291. Carpenter also opposed the mandamus petition. The jurisdictional issues were carried with the appeal and briefed in full along with the merits. On the merits, Carpenter argued, first, that the contested discovery materials were not privileged and, alternatively, that any privilege had been waived by Mohawk's litigation conduct.

The Eleventh Circuit dismissed the appeal for lack of jurisdiction. The court held that the district court's order was not a final appealable decision. It explained that it would not extend the collateral order doctrine to reach "a discovery order implicating the attorney-client privilege." *Id.* 11a. Such orders, the court held, are not "effectively unreviewable" after final judgment because, if the court of appeals later were to find that the district court's order was erroneous, it could reverse and require a new trial at which any privileged evidence, documents, or witnesses would be excluded. *Id.* 8a. The Eleventh Circuit also held that "[m]andamus is appropriate only when there has been a clear usurpation of power or abuse of discretion, and Mohawk has not shown that either occurred here." *Id.* 15a.

## SUMMARY OF ARGUMENT

**I.** The final judgment rule is longstanding, codified by statute, and essential to judicial administration. In keeping with that rule, this Court has consistently refused to permit immediate appeals from pretrial discovery orders, including orders denying privilege claims. That settled approach avoids the delay and expense of successive appeals and respects the district court's authority over the discovery process.

**II.** Discovery orders denying claims of attorney-client privilege, as a category, satisfy none of the stringent criteria for collateral-order review. First, privilege rulings are inconclusive because they are particularly subject to reconsideration. This Court's traditional insistence that parties face contempt before appealing discovery orders gives the judge and the parties a "second look," thereby facilitating *in camera* review and eliminating unnecessary and unimportant appeals.

Second, privilege denials are not completely separate from the merits. To the contrary, discovery disputes in general are enmeshed in the merits, and attorney-client privilege disputes, such as those involving the crime-fraud exception and waiver, almost always require courts to assess the relevance of the evidence to the claims or defenses on the merits.

Third, attorney-client privilege claims are not important enough to overcome the final judgment rule. Unlike the rights that this Court has identified in recent years as sufficiently important to justify immediate review, such as qualified immunity or double jeopardy, the privilege does not confer a well established immunity or a constitutional or statutory right not to stand trial.

Fourth, orders denying attorney-client privilege claims are not effectively unreviewable after final judgment. The argument that the cat will get out of the bag—which could be made with respect to any discovery order—ignores existing options, such as protective orders and discovery sanctions, that prevent disclosure to the world while preserving the issue for review. The argument also relies on a mischaracterization of the privilege, whose purpose is to encourage future clients to communicate frankly with attorneys—an incentive that is in no way diminished by deferring appeal until final judgment.

**III.** To conclude that collateral-order review is unavailable is not to foreclose immediate review altogether. Although most privilege disputes are routine and factbound, mandamus and certification under section 1292(b) are available if a ruling is exceptionally important or raises novel questions. Those two safety valves allow appellate courts to deploy their scarce resources prudently without inviting a flood of appeals requiring document-by-document review.

If further interlocutory review of a category of discovery orders is needed, rulemaking—rather than expansion by court decision—is Congress's preferred way of addressing that need. Rulemaking not only avoids the hazards of making sweeping changes based on the briefing in a single case, but permits experts to consider competing policy considerations, make empirical predictions, and submit their recommendations for ultimate review by Congress. And unlike the collateral-order doctrine, it allows policymakers to authorize discretionary review, as they have done for rulings on class certification.

**IV.** A decision from this Court allowing immediate appeals from privilege disputes would impose a significant burden on already overburdened appellate courts and stop much district-court litigation in its tracks. And because there are no principled distinctions between the various privileges and types of discovery disputes, such a decision would also generate considerable litigation testing the boundaries of the new exception—as has already occurred in the three circuits that have experimented with immediate appeals from privilege disputes.

## ARGUMENT

### I. THIS COURT HAS CONSISTENTLY REFUSED TO ALLOW IMMEDIATE APPEALS FROM PRETRIAL ORDERS CONCERNING DISCOVERY, PRIVILEGE DISPUTES, AND THE ATTORNEY-CLIENT RELATIONSHIP.

Mohawk asks this Court to bestow an entitlement to immediate appeal on "every litigant faced with an adverse finding of waiver or ordered to produce privileged information." Pet. 18. That request, however, cannot be reconciled with more than one hundred years of this Court's cases, which have consistently held that an "order enforcing a discovery request is not a 'final order'" and hence is not immediately appealable. *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992). That rule of nonappealability holds true even for discovery orders overruling important privileges that are central to "our adversary system of justice" and "found in the

Constitution," *Maness v. Meyers*, 419 U.S. 449, 461 & n.8 (1975), such as the Fifth Amendment's right against self-incrimination. *See Alexander v. United States*, 201 U.S. 117, 120-22 (1906).

Under this Court's cases, "litigants have not been able routinely to vindicate, through immediate appeal, a legal right to avoid discovery, even where the Constitution provides that antidiscovery right." *Behrens v. Pelletier*, 516 U.S. 299, 318 (1996) (Breyer, J., dissenting). It follows, *a fortiori*, that there can be no immediate appeal from orders overruling garden-variety claims of attorney-client privilege. It would be "highly anomalous for the law to deny a routine interlocutory appeal where the Constitution of the United States protects an antidiscovery interest, but to permit a routine appeal" asserting such an interest under a common-law evidentiary privilege. *Id.* at 319. That anomaly, however, would flourish under Mohawk's approach.

This Court has repeatedly cautioned against opening the door to appeals that would undermine "the deference owed by appellate courts to trial judges charged with managing the discovery process." *Cunningham v. Hamilton County*, 527 U.S. 198, 209 (1999). Such appeals "could forestall resolution of the case as each new [order] would give rise to a new appeal." *Id.* That concern has "particular force in the discovery context" because discovery "has a special potential for spawning rulings that aggrieved parties would seek to appeal." *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 119 (4th Cir. 1994). By its nature, "the process of turning over private—and often damaging—information to an adversary inevitably causes friction. The sheer number of discovery rulings and the myriad procedural requirements governing them, creates fertile soil for the growth of appealable orders." *Id.*

To deter the flood of appeals that would otherwise ensue, this Court has always insisted that a party on the losing end of a discovery order be put to a series of choices. On the one hand, the party may comply with the order, reserving its appeal until the end of the case. Complying with the order does not mean, however, that the discovery materials must be made available to the whole world. The court may enter a protective order, such that the documents may be used by opposing counsel in preparing for trial, and admitted in evidence under seal, but only made public in the relatively rare event that a trial occurs. Or the losing party may refuse to produce the materials but face sanctions, such as allowing the trier of fact to regard a contested fact as established, *see* Fed. R. Civ. P. 37(b)(2)(A)(i)—again, with the losing party reserving the right to appeal. On the other hand, if the party nonetheless desires an immediate appeal—but the order is insufficiently important to warrant either mandamus or certification, *see* 28 U.S.C. § 1292(b)—the party may "defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

Insisting on the latter procedure as a last resort encourages careful reconsideration by both the parties and the trial judge and discourages unnecessary or insubstantial appeals. Commonly known as the *Cobbledick* rule, after Justice Frankfurter's opinion in *Cobbledick v. United States*, 309 U.S. 323 (1940), the disobedience-and-contempt requirement as a precondition for immediate appeal has its foundations in early cases such as *Alexander*, was affirmed unanimously in *United States v. Ryan*, 402 U.S. 530, 533 (1971), and has been invoked in every case in which this Court has discussed the appealability of discovery orders since that time. *See, e.g.*, *Cunningham*, 527 U.S. at 204 n.4. Relying on that body of precedent, the Court deemed the "procedure described in *Ryan*" to be "an eminently reasonable method to allow precompliance review" of the denial of an attorney's constitutional privilege claim concerning the disclosure of confidential client materials in a civil case. *Maness*, 419 U.S. at 461.

This Court has recognized only two narrow "exception[s]" to the "requirement of submitting to contempt" for privilege disputes, *United States v. Nixon*, 418 U.S. 683, 691 (1974), and both are based on special circumstances of the appellant rather than the nature of the privilege asserted. *Nixon* held that the "unique" concerns raised by an assertion of privilege by the President made the "traditional contempt avenue" "peculiarly inappropriate." *Id.* at 691. Requiring a judge to hold the President of the United States in contempt could create an unnecessary "constitutional confrontation between two branches of the Government," and, indeed, there could even be protracted litigation over "whether a President can be cited for contempt" in the first place. *Id.* at 691-92. This separation-of-powers exception is limited to the President, who is perhaps the "'sole indispensable man in government.'" *Clinton v. Jones*, 520 U.S. 681, 713 (1997) (Breyer, J., concurring in judgment) (quoting P. Kurland, *Watergate and the Constitution* 135 (1978)).

The second exception derives from *Perlman v. United States*, 247 U.S. 7, 12-13 (1918), which allowed an immediate appeal where a subpoena was directed to a third party in possession of purportedly privileged information because "it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege." *Nixon*, 418 U.S. at 691; *see Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 179 (2d Cir. 1979) (Friendly, J.) (discussing *Perlman*). Neither one of the two exceptions applies here.

The pedigree of the *Cobbledick* rule, the consistency with which this Court has applied it, and the narrowness of its two exceptions all underscore the sea change that would result from allowing appeals as of right from every run-of-the-mill privilege dispute. Mohawk's approach would not simply create a broad new class of appeals; it could wipe out the *Cobbledick* rule entirely. In short, Mohawk's rule is incompatible with every one of this Court's precedents addressing the appealability of discovery orders.

Nor can Mohawk's position be squared with this Court's approach—in both the discovery and attorney-disqualification contexts—to concerns that certain pretrial orders will threaten to destroy attorney-client confidentiality or encroach on the attorney-client relationship.

This Court has decided a trilogy of cases concerning the appealability of rulings on attorney disqualification. The first, *Firestone*, held that immediate appeals cannot be taken from orders denying motions to disqualify opposing counsel in a civil case. 449 U.S. at 370. The next two held that immediate appeals cannot be taken from orders disqualifying the appellant's *own chosen counsel* in criminal and civil cases, respectively. *Flanagan v. United States*, 465 U.S. 259 (1984); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). Such orders involve at least as great an intrusion on the attorney-client relationship as orders denying privilege claims, given the "fundamental premise of the adversary system" that "individuals have the right to retain the attorney of their choice." *Id.* at 441 (Brennan, J., concurring).

Notably, *Firestone* rejected an argument for immediate appeal based on attorney-client confidentiality concerns that echo those urged by Mohawk here—namely, "the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of [attorney-client] confidence" by opposing counsel, and "the effect of such a tainted proceeding in frustrating public policy." 449 U.S. at 376. The Court explained that any potential harm caused by precluding an immediate appeal, including the breach of attorney-client confidentiality, was not materially different from the harm resulting from "other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection." *Id.* at 378 (citation omitted).

Similarly, this Court has frankly acknowledged, in the context of the Fifth Amendment, Mohawk's concern that a party faced with a discovery order rejecting a privilege claim would be "compelled to surrender the very protection which the privilege is designed to guarantee," such that reliance on review at a later stage would "'let the cat out' [of the bag] with no assurance whatever of putting it back." *Maness*, 419 U.S. at 462-63. But the Court nevertheless held that an adequate response to this familiar dilemma—that "appellate courts cannot always 'unring the bell' once the information has been released"—is the "familiar procedure" of facing contempt and thereby pursuing precompliance appellate review. *Id.* at 460-63 (citing *Cobbledick*, *Alexander*, and *Ryan*). Although that case involved an appellant who secured review via contempt rather than an appellant seeking to appeal prematurely, its reasoning—and the earlier holding in *Alexander* on which it relies—are nonetheless in substantial tension with Mohawk's position.

In sum, this Court has already concluded that appeals as of right cannot be taken from orders denying discovery objections based on the work-product doctrine or constitutional privileges, or from orders denying motions for attorney disqualification based on concerns of attorney-client confidentiality. Mohawk has articulated no principled distinction between those orders and orders denying attorney-client privilege based on waiver. In each case, allowing immediate appeals of such orders would "transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291." *Firestone*, 449 U.S. at 378.

## II. PRETRIAL ORDERS DENYING ATTORNEY-CLIENT PRIVILEGE CLAIMS ARE NOT IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE.

Since the first Judiciary Act of 1789, Congress has strictly limited appeals as of right within the federal courts to appeals from "final decisions of the district courts." 28 U.S.C. § 1291. The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted).

The final judgment rule represents a wise allocation of time and authority. By consolidating in one appeal all of the grounds for challenging a trial court's judgment, the rule avoids delay, promotes judicial efficiency, and reduces litigants' ability to harass opponents through a succession of time-consuming and costly appeals. And because many cases settle or are resolved on other grounds in favor of the potential appellant, the rule avoids many appeals entirely. It also gives effect to Congress's determination that litigation is best managed at both the trial and appellate levels if the district courts are free from repeated second-guessing by the appellate courts in the midst of litigation. *Cunningham*, 527 U.S. at 203-04.

By contrast, a number of statutes illustrate Congress's ability to legislate where the final judgment rule embodied in section 1291 would "create undue hardship." *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981). One such statute is 28 U.S.C. § 1292(b), which provides for discretionary certification by the district court and discretionary acceptance by the court of appeals of important, non-final questions of law. Other statutes cover specific subjects, such as certain orders relating to arbitration. *See, e.g.*, *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896, 1900 (2009) (discussing 9 U.S.C. § 16(a)(1)(A)).

Even where Congress has not drafted a specific exception to section 1291, the Court has allowed immediate appeals from a "small class" of collateral orders that do not end the litigation. *Will v. Hallock*, 546 U.S. 345, 349 (2006). The collateral order doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), imposes three "stringent" requirements for membership in that class—orders must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)).

Before explaining why orders denying attorney-client privilege claims fail each one of those requirements, two points about the doctrine warrant emphasis.

First, this Court has "consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral." *Cunningham*, 527 U.S. at 206. To provide certainty and reduce litigation over the scope of the doctrine, the appealability question "must be determined by focusing upon the category of order appealed from" rather than the "'facts of a particular case.'" *Behrens*, 516 U.S. at 311 (citation omitted). In other words, the relevant question here is whether attorney-client privilege rulings, *as a category*, meet each of the *Cohen* criteria—a principle that Mohawk fails to appreciate. *See* Mohawk Br. 11, 18, 20-22.

Second, in contrast with earlier periods of expansion, the Court has increasingly "stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule." *Digital*, 511 U.S. at 868 (quoting *Richardson-Merrell*, 472 U.S. at 436). Thus, in recent years, this Court has generally limited expansion of *Cohen* to well-established immunities—such as qualified immunity—or rights embodied in statutory or constitutional provisions. *See id.* at 869-78.

That restrained approach respects Congress's judgment that rulemaking, and "not expansion by court decision," is now the preferred method of determining which orders are immediately appealable. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 (1995) (discussing 1990 and 1992 Rules Enabling Act amendments); *see* 28 U.S.C. §§ 1292(e), 2072(c). Apart from the virtue of avoiding legislation from the bench, rulemaking is itself beneficial. Rather than using "the blunt, categorical instrument of § 1291 collateral order appeal," *Digital*, 511

U.S. at 883—which ushers in an entire family of appeals based on arguments in a single case—rulemaking employs an expert committee to make predictive judgments and assess competing policy considerations based on conditions on the ground, subject to final review by Congress. 28 U.S.C. §§ 2073, 2074(a). "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." *Cunningham*, 527 U.S. at 210 (quoting *Swint*, 514 U.S. at 48).

### A. Orders Denying Attorney-Client Privilege Claims Are Inconclusive, Subject To Reconsideration, And Inherently Tentative.

The first condition for an immediate appeal under *Cohen* is that the type of order at issue "conclusively determine the disputed question," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), or, put another way, that it constitute a "fully consummated decision." *Cohen*, 337 U.S. at 546. Orders denying claims of attorney-client privilege—as a category—fail two distinct conclusiveness requirements.

**1.** The conclusiveness prong is not satisfied unless the type of order is "a complete, formal and, in the trial court, a final rejection" of the claim, *United States v. MacDonald*, 435 U.S. 850, 858 (1978) (quoting *Abney v. United States*, 431 U.S. 651, 659 (1977)), meaning that "[t]here are simply no further steps that can be taken in the District Court to avoid" violating a party's claimed right. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (quoting *Abney*, 431 U.S. at 659). This requirement assesses whether the issue has fully ripened, such that nothing stands between the challenged ruling and the point at which the asserted right is lost.

"Details of discovery are," as a general matter, "a long way from final decision." *Reise v. Bd. of Regents of Univ. of Wisc.*, 957 F.2d 293, 294 (7th Cir. 1992). Discovery orders denying privilege claims, in particular, are nonfinal because the conclusiveness prong "requires that the *more conclusive* order of contempt, which truly leaves nothing for the court but its execution, be entered before appeal is permitted." *In re Grand Jury Subpoena for N.Y. State Income Tax Records*, 607 F.2d 566, 569 (2d Cir. 1979) (emphasis added). This requirement can be traced at least as far back as this Court's 1906 decision in *Alexander*, which explained that "the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision." 201 U.S. at 122. Although "in a certain sense, finality can be asserted of any order of a court," such orders are not fully consummated because the court can "go farther" by issuing a contempt citation, permitting review "without unduly impeding the progress of the case." *Id.* at 121. If, and only if, the court takes that step will the objections be "ripe for appellate review." *Ryan*, 402 U.S. at 532; *see Cunningham*, 527 U.S. at 204 n.4; *Webster Coal & Coke Co. v. Cassatt*, 207 U.S. 181, 186-87 (1907).

2. The conclusiveness inquiry also encompasses a second, closely related, requirement that there be "nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion." *Mitchell*, 472 U.S. at 527. The rationale is that there is "little justification for immediate appellate intrusion so long as there is a plain prospect that the trial court itself may alter the challenged ruling." 15A Wright & Miller, *Federal Practice & Procedure* § 3911.1, at 372 (2d ed.

1992). For example, this Court has held that orders denying stays are inconclusive because they do not '"necessarily contemplate that the decision will close the matter for all time,"' *Gulfstream*, 485 U.S. at 276 (citation omitted), and that class certification orders are inconclusive because they are "inherently tentative" and "subject to revision in the District Court." *Coopers*, 437 U.S. at 469 & n.11.

**a.** This aspect of conclusiveness has special significance for privilege disputes because the disobedience-and-contempt requirement is designed to facilitate reconsideration by both the parties and the district judge. After a party indicates its intention to refuse to comply with the disclosure order, the privilege claims may be either accepted or "rejected *at that time* by the trial court," and only if they are rejected the second time are they "ripe for appellate review." *Ryan*, 402 U.S. at 532 (emphasis added).

As Judge Friendly explained, this procedure gives both the parties and the district judge "a second look" and thus "serves a useful purpose in curtailing appeals." *Nat'l Super Spuds*, 591 F.2d at 180. The party seeking to avoid discovery "may decide . . . that the importance of the issue and the risk of adverse appellate determination do not warrant being branded as a contemnor," while "the person seeking information . . . may decide that the quest is not important enough to seek a contempt citation, thereby entailing the delay of an appeal." *Id.* The procedure acts, in other words, as a filtering mechanism; it "works, in part, because it 'encourages reconsideration both by the party resisting discovery and by the party seeking discovery, and in part because it tends to limit appeals to issues that are both important and reasonably likely to lead to reversal.'" *Behrens*, 516 U.S. at 319 (Breyer, J., dissenting) (quoting 15B Wright & Miller, *Federal Practice* § 3914.23, at 154). By contrast, "the alternative to the contempt route"—immediate appeals for everyone—"encourages appeal of every unpalatable discovery ruling," however routine. *MDK*, 27 F.3d at 122.

**b.** The "second look" procedure is especially apt for privilege disputes, which often involve hundreds or thousands of documents overall but must be decided as to specific documents (for discovery requests) or specific questions (for depositions or trial testimony). *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, 2006 WL 1726675, at *2 (5th Cir. 2006) (30,000 documents alleged to be privileged). Privilege claims may not be "tossed as a blanket" over an "undifferentiated" mass of documents, *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982), and any attempt to make a privilege ruling without being "exposed to the contested documents and the specific facts which support a finding of privilege" for each document "amounts to nothing more than a waste of judicial time and resources." *Holifield v. United States*, 909 F.2d 201, 204 (7th Cir. 1990). Indeed, because it can require detailed scrutiny and involve a large volume of evidence, the task of "reviewing discovery documents for privilege" is often delegated to a special master. Fed. R. Civ. P. 53(a)(1)(C), 2003 Adv. Comm. Notes. One district judge recently observed that "[t]he need for special masters to conduct privilege reviews is likely to expand" in light of the "huge volume" of electronically-stored information increasingly produced in discovery. Scheindlin, *Special Masters and E-Discovery*, 30 Cardozo L. Rev. 347, 385-86 (2008). Such time-consuming consideration and reconsideration of factbound issues is just the sort of task that "trial judges, not appellate judges, confront almost daily," and is thus especially ill-suited for review under the collateral order doctrine. *Johnson v. Jones*, 515 U.S. 304, 316 (1995).

Giving the trial court a chance to double-check its privilege rulings is also useful because it facilitates *in camera* review. In *Kerr v. U.S. Dist. Court*, 426 U.S. 394 (1976), this Court held that a mandamus petition seeking review of a privilege denial was premature because the district judge had not had a chance to engage in that "relatively costless and eminently worthwhile method to ensure that the balance" was "correctly struck" between the privilege claim and the asserted need for the documents—a balance that would "inevitably vary with the nature of the specific documents." *Id.* at 405; *see United States v. Zolin*, 491 U.S. 554, 572 (1989) (authorizing *in camera* review for attorney-client privilege disputes).

To be sure, all trial court orders short of judgment "may be revised at any time." Fed. R. Civ. P. 54(b). But orders concerning privilege disputes are "inherently tentative" as a class, *Coopers*, 437 U.S. at 469 & n.11, in part because they are often the first in a two-step process facilitated by the Federal Rules of Civil Procedure: first, a ruling based on a privilege log or other specific description and, second, if necessary, *in camera* review. *See, e.g., In re BankAmerica Corp. Securities Litigation*, 270 F.3d 639, 644 (8th Cir. 2001); *Pengate Handling Sys. v. Westchester Surplus Lines Ins. Co.*, 2007 WL 1176021, at *1 (M.D. Pa. 2007); *United States v. Davis*, 131 F.R.D. 427 (S.D.N.Y. 1990). Parties asserting a privilege claim must first "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that," without revealing the information, "will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A)(ii). This requirement is designed to "reduce the need for *in camera* examination of the documents." *Id.*, 1993 Adv. Comm. Notes. The precise procedure to be used, however, is not defined further. "The matter is left entirely to the discretion of the judge." 2 Rice, *Attorney-Client Privilege in the United States* § 11.13, at 111 (2d ed. 1999 & Supp. 2009); *see Matter of Walsh*, 623 F.2d 489, 494 n.5 (7th Cir. 1980). In some cases, trial judges may specifically invite litigants to seek either a restrictive protective order or *in camera* review following an initial denial of a privilege claim. *See, e.g., N.Y. Teamsters Council Prepaid Legal Servs. Plan v. Primo & Centra*, 159 F.R.D. 386, 388 (N.D.N.Y. 1995).

Finally, in many cases, attorney-client privilege rulings, such as those deciding motions *in limine*, govern only the "use of confidential communications as evidence at trial." *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 164 (2d Cir. 1992). For this reason, privilege denials may not actually lead to disclosure; that will depend on the outcome of other pretrial motions, whether the case settles before trial, or the evidence the parties choose to introduce over the course of the trial. *See, e.g., B.H. ex rel. Holder v. Gold Fields Mining Corp.*, 239 F.R.D. 652, 656 (N.D. Okla. 2005); *Rutgard v. Haynes*, 185 F.R.D. 596, 602 (S.D. Cal. 1999). Indeed, a party that prevails in a privilege dispute might nevertheless decide not to seek or rely on the documents to avoid facing an appeal at the end of the case. For this reason, "[i]nstead of trying to predict how the trial will play out," appellate courts "defer review until the end, when [they] can see how matters *did* play out." *In re Lewis*, 212 F.3d 980, 985 (7th Cir. 2000).

One last example—something that happens regularly in district courts—reveals the unworkability of Mohawk's approach: At trial, a party objects to a question asked of a witness on attorney-client privilege grounds. The court overrules the objection—on the ground, for example, that the privilege has been waived—and orders the witness to answer (an order, in other words, "compelling the production of privileged information," Mohawk Br. i). Under Mohawk's theory, that party is entitled to take an immediate appeal in the middle of trial.

### B. Orders Denying Attorney-Client Privilege Claims Are Intertwined With, Not Completely Separate From, The Merits Of The Underlying Case.

To obtain collateral-order review, Mohawk must show that attorney-client privilege rulings are "completely separate from the merits of the action." *Coopers*, 437 U.S. at 468. That requirement is not met whenever the issue presented may be "entangled in the merits of the underlying dispute," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988), "involve[s] an assessment of the likely course of the trial," *Richardson-Merrell*, 472 U.S. at 439, or requires the court "to review the nature and content of th[e trial court] proceedings." *Id.*

The Court's "warn[ing] that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs," *Digital*, 511 U.S. at 868, is particularly relevant to the separateness inquiry. Even where it is "undoubtedly true" that some cases within the category are separate from the merits and "appeal might result in substantial savings of time and expense," the Court "look[s] to categories of cases, not to particular injustices." *Van Cauwenberghe*, 486 U.S. at 529. As a category, district court orders that reject claims of attorney-client privilege are entwined with, not completely separate from, the merits.[2]

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[2] Mohawk's separateness argument (at 20-22), by contrast, concerns only the dispute in this case. In any event, the privilege dispute in this case *is* enmeshed in the merits. Carpenter argued below that Mohawk's "investigation" was not privileged because it was (continued...)

Pretrial discovery rulings—of which attorney-client privilege rulings are one example—are quintessentially "enmeshed in the merits of the dispute," *id.* at 528, precisely *because* they concern whether parties may obtain evidence "that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); *see Cunningham*, 527 U.S. at 205. A privilege is not, of course, lost simply because the material is relevant. But because the attorney-client "privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Zolin*, 491 U.S. at 562 (citation and quotation omitted). Courts must often balance the privilege's importance against the search for truth, which is why applicability of the privilege's exceptions turns on whether the information sought is "relevant" to the merits. *See* Proposed Fed. R. Evid. 503(d)(2)-(5) (reproduced in *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 236-37 (1972)).[3]

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(...continued)

part of an effort to intimidate Carpenter, not to provide the company legal advice. Alternatively, Carpenter argued that even if the communications were privileged, Mohawk's defense to liability in this case and in *Williams* had placed the communications "at issue" and, thus, waived the privilege. The district court's ruling on these issues required the court to "review the nature and content" of the merits. *Richardson-Merrell*, 472 U.S. at 439; *see* Pet. App. 17a-21a, 42a, 51a-52a.

[3] Proposed Federal Rule of Evidence 503(d)—also known as Supreme Court Standard 503(d) because it was approved by this Court in 1972—incorporates the "well established exceptions" to the attorney-client privilege at common law, 56 F.R.D. at 239, and therefore "has considerable utility as a guide to the federal common law." 3 Weinstein & Berger, *Weinstein's Federal Evidence*, § 503.02, at 503-10 (2d ed. 1997).

A review of two of the most common types of attorney-client privilege disputes helps explain why such disputes generally are inseparable from the merits.

### a. The Crime-Fraud Exception

Under the crime-fraud exception, the attorney-client privilege "does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *Zolin*, 491 U.S. at 563; *see Clark v. United States*, 289 U.S. 1, 15 (1933); Proposed Fed. R. Evid. 503(d)(1). Some courts have extended the exception beyond crime and common-law fraud to communications about other intentional torts. *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994); *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982); *Recycling Solutions, Inc. v. District of Columbia*, 175 F.R.D. 407, 409 (D.D.C. 1997); *see generally* Mueller & Kirkpatrick, *Evidence* § 5.22, at 362 (3d ed. 2003). Regardless of its exact parameters, "there has been a pronounced trend toward utilizing [the crime-fraud] exception to the attorney-client privilege" and there is a large amount of litigation over whether it applies. Kanner & Nagy, *Perspectives on the Attorney-Client Privilege and the Work-Product Doctrine, in The Attorney Client Privilege in Civil Litigation* 81, 92 (Vincent S. Walkowiak ed., ABA 2008).

The crime-fraud exception almost invariably is intertwined with the merits because the alleged crime, fraud, or tort giving rise to invocation of the exception almost always concerns conduct at issue in the underlying case, as illustrated by this Court's decision in *Zolin*. That case involved an investigation into the tax returns of the Church of Scientology's founder in which the IRS sought allegedly privileged audiotapes under the crime-fraud exception. 491 U.S. at 556-57; *see United States v. Zolin*, 809 F.2d 1411, 1414 (9th Cir. 1987) (discussing tax evasion allegations). Specifically, the government claimed that the party opposing a privilege claim has the right to submit the very evidence claimed to be privileged for *in camera* review. 491 U.S. at 560. The Court agreed, so long as the party seeking discovery makes a threshold showing that *in camera* review may yield evidence establishing that the crime-fraud exception applies. *Id.* at 572-73.

By authorizing *in camera* review of the "best evidence establishing the applicability of the 'crime-fraud' exception," 809 F.2d at 1418—that is, "an integral part of the intended illegality that the [party opposing the privilege] seeks to establish," *id.*—*Zolin* assured that future rulings on the crime-fraud exception would almost always be a preview of the merits. *See, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Quickie Transp. Co.*, 174 F.R.D. 50, 52 (E.D. Pa. 1997) (transferring subpoena proceeding to district court in which main litigation was pending because "the resolution of whether the crime-fraud exception to the attorney-client privilege applies would require this court to delve into the merits of the underlying action.").

One of the cases on which Mohawk relied in its petition for certiorari illustrates the close relationship between the merits and adjudication of a crime-fraud dispute. In *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078 (9th Cir. 2007), the merits concerned whether a corporation, Bertelsmann, could be held secondarily liable for copyright infringement because it controlled the primary infringer, Napster. One theory for establishing secondary liability was that "Bertelsmann used its lawyers to create sham loan documents that were designed to disguise what was, in fact, a purchase of control of Napster." *Id.* at 1084. Although the Ninth Circuit authorized *Cohen* review, the court's discussion of whether the crime-fraud exception applied, *id.* 1096-98, focused almost entirely on the merits—that is, whether the loan documents and other evidence demonstrated that "the entire loan was a sham intended for use in future legal proceedings as a means of disguising Bertelsmann's purchase of control of Napster." *Id.* at 1096.

*Zolin* and *Napster* illustrate what common sense dictates: A party seeking to overcome the attorney-client privilege by discovering evidence of a crime, fraud, or other intentional tort will be seeking material it believes is relevant to the underlying claim.[4]

### b. Waiver of the Attorney-Client Privilege

Disputes over whether the attorney-client privilege has been waived occur frequently. The privilege can be waived expressly when otherwise privileged communications are revealed outside of the attorney-client relationship. More important for present purposes, the privilege can be waived impliedly when attorney-client communications are injected into the litigation. Disputes over whether an implied waiver has occurred generally require an inquiry into the merits. As the leading treatise explains:

> Communications between attorney and client can be made a substantive issue of the cause of action through claims made by the

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[4] *See also, e.g., United States v. Ruhbayan*, 406 F.3d 292, 299 (4th Cir. 2005), *aff'g* 201 F. Supp. 2d 682, 685-86 (E.D. Va. 2002); *White v. Am. Airlines, Inc.*, 915 F.2d 1414 (10th Cir. 1990); *Alcon Mfg., Ltd. v. Apotex Inc.*, 2008 WL 5070465 (S.D. Ind. 2008); *Invesco Inst. (N.A.), Inc. v. Paas*, 244 F.R.D. 374, 391 (W.D. Ky. 2007); *Abbott Labs. v. Andrx Pharms., Inc.*, 241 F.R.D. 480, 488-89 (N.D. Ill. 2007).

> client (*e.g.*, a good-faith reliance on advice of counsel defense or a charge of ineffective assistance of counsel), or when those communications are *relevant to*, but not operative facts of, the client's claims (*e.g.*, lack of knowledge defense). When the client makes the communications with counsel a substantive issue in the litigation, courts have consistently held that the attorney-client privilege protecting those communications is waived. A client will be required to disclose privileged attorney-client communications whenever she is perceived as placing, directly or indirectly, those communications "at issue" in the cause of action.

2 Rice, *Attorney-Client Privilege* § 9:44, at 213–14 (footnote omitted, emphasis in original).

A claim of waiver thus requires an assessment of the types of claims and defenses asserted by the client and, in some instances, the degree to which the attorney-client communications are relevant to the client's claims or defenses. *See, e.g., Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1206-07 (8th Cir. 1982); *Greater Newburyport Clamshell Alliance v. Public Serv. Co. of New Hampshire*, 838 F.2d 13, 18-20 (1st Cir. 1988).

Perhaps the most significant type of waiver is where a client maintains that it relied on advice of legal counsel "as a defense or as the basis for [its] claims, or otherwise offers proof of such reliance in establishing the claim or defense." 2 Rice, *Attorney-Client Privilege* § 9:45, at 220. Determining whether this type of waiver applies requires the court, at a minimum, to analyze the scope of the claims or defenses to determine whether the client has relied on advice of counsel in asserting those claims or defenses. Moreover, the waiver extends only to "communications with counsel *relating to* the reliance." *Id.* § 9:45, at 220–221 (emphasis added). Thus, in determining the scope of the waiver, the court must inquire into exactly what communications the client relied on, which will, in turn, also define the scope of the defense or claim in the litigation, which itself depends on the extent of the client's reliance. The courts have considered this type of waiver in dozens upon dozens of cases, and the question whether the party opposing waiver has put the privileged communications "at issue" is bound up with the merits in most of them. *Id.* § 9:45, at 221–238 & nn. 1-3.

3. Three of this Court's precedents underscore the lack of separateness here. First, *Richardson-Merrell* held that orders disqualifying counsel on the ground that they might be required to testify at trial "are inextricable from the merits because they involve an assessment of the likely course of the trial and the effect of the attorney's testimony on the judgment." 472 U.S. at 439. Notably, the Court reached that conclusion even though the strength or relevance of the evidence need not be assessed to resolve most disqualification disputes. Such an assessment *is* required, however, to resolve many attorney-client privilege disputes, such as crime-fraud and waiver disputes.

Second, *Van Cauwenberghe* held that orders denying *forum non coveniens* motions are not completely separate from the merits because, in determining whether a particular forum affords access to the evidence, a court must assess whether the evidence is "critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action." 486 U.S. at 528. That observation applies here because adjudication of many attorney-client privilege disputes requires courts to determine the *relevance* of the evidence to the underlying claim or defense.

Finally, *Cunningham* held that orders imposing discovery sanctions on attorneys are not immediately appealable because, in deciding whether a failure to respond to a discovery request is sanctionable, the court may need "to inquire into the importance of the information sought or the adequacy or truthfulness of a response." 527 U.S. at 205. That inquiry is similar to the relevance assessments that a court must make when considering whether an exception to the attorney-client privilege applies.

### C. Discovery Objections Based On Attorney-Client Privilege Are Not Sufficiently Important To Override The Final Judgment Rule.

In recent years, this Court has stressed the need to assess the "importance" of the right at stake to determine whether immediate appeal is warranted. *Will*, 546 U.S. at 351-52; *Digital*, 511 U.S. at 877-81. It has explained that "importance" straddles two of the *Cohen* prongs: the second, which requires that the type of order present "important questions completely separate from the merits," and the third, which requires that "the decision on an 'important' question could be 'effectively unreviewable' upon final judgment." *Id.* at 869.

1. To be sure, the attorney-client privilege is important in a general sense. But importance is a relative concept, and it is therefore meaningless without comparisons. Its role in the doctrine—as *Digital* explained at length—is to restrict membership in the "small class" of immediately appealable orders by balancing the value of the interests at stake against the need for finality. *Id.* at 879; *Will*, 546 U.S. at 351-52. This Court "has identified as 'sufficiently important' interests that are considerably

more important" than the interest in "avoiding discovery," *Behrens*, 516 U.S. at 317-18 (Breyer, J., dissenting), such as the rights not to stand trial guaranteed by the qualified immunity doctrine, or the interest in avoiding imprisonment guaranteed by the Excessive Bail Clause.

Mohawk discusses the importance of attorney-client privilege in a vacuum, omitting any meaningful comparison to this Court's treatment of analogous rights under the collateral order doctrine. *See* Mohawk Br. 19-20, 27-30 (discussing importance generally), *id.* 12, 30-31 (making comparisons only to earlier *Cohen* cases involving imposition of costs, stay orders, bail reduction, and attachment of vessels). Mohawk thus fails to grapple with a central problem in this case: why this Court should regard orders overruling attorney-client privilege claims as *more important* than, for example, "'orders requiring discovery over a work-product objection,'" *Firestone*, 449 U.S. at 378 (citation omitted); orders denying a motion to disqualify an opposing attorney based on concerns about the "breach of [attorney-client] confidence," *id.* at 376; or orders requiring discovery over objections based on the Fourth or Fifth Amendments. *Alexander*, 201 U.S. at 120-22.

2. One critical measure of importance is whether the rights at issue are among "those originating in the Constitution or statutes." *Digital*, 511 U.S. at 879. In the nearly two decades since Congress designated rulemaking rather than "expansion by court decision" as the preferred way of defining which orders are appealable, *Swint*, 514 U.S. at 48, this Court has not recognized a new category of collateral orders that did not involve important rights "embodied in a constitutional or statutory provision." *Digital*, 511 U.S. at 879. Even orders requiring discovery over claims of constitutional privilege are not immediately appealable. *Alexander*, 201 U.S. at 120-

22. And "the attorney-client privilege is merely a rule of evidence," not a "constitutional right." *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985); *see Maness*, 419 U.S. at 461 & n. 8 (distinguishing constitutional privileges from common-law privileges such as "priest and penitent, lawyer and client, physician and patient, and husband and wife"); *see also id.* at 466 n.15. Indeed, although the Rules now address inadvertent waiver, Congress has declined to set the privilege itself in stone, leaving it on the same footing as any other common-law privilege in the eyes of Federal Rule of Evidence 501, to be "determined on a case-by-case basis." *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (quoting S. Rep. No. 93-1277 at 13 (1974)); *see* Fed. R. Evid. 502(g)(1).

The lack of a constitutional right takes on added significance in light of the attorney-disqualification cases. In *Richardson-Merrell*, for example, Justice Brennan's concurrence acknowledged that a "fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice," 472 U.S. at 441, and Justice Stevens's dissent similarly described it as a "fundamental right." *Id.* at 442. That right, however, was insufficiently fundamental to overcome the congressional policy of finality. *Id.* at 440-41; *see also Firestone*, 449 U.S. at 378.

Similarly, the absence of a constitutional right distinguishes *Sell v. United States*, 539 U.S. 166 (2003), a case on which Mohawk relies. *Sell* justified immediate appeals from orders requiring mentally ill defendants to take antipsychotic drugs against their will, reasoning that the "severity of the intrusion and the corresponding importance of the constitutional issue" distinguished such orders from attorney-disqualification or evidence-suppression rulings, which do not involve a right not to be tried and hence are not immediately appealable. *Id.* at

177; *see id.* at 190-91 (Scalia, J., dissenting). Common-law privilege disputes involve no "sever[e]" bodily "intrusion[s]" and present no "constitutional issue[s]," let alone "important" ones. *Sell* thus undermines rather than supports Mohawk's argument.

3. Lacking a constitutional footing, Mohawk and its *amici* discuss the importance of the attorney-client privilege by emphasizing its place in the adversarial process, its status as one of the oldest evidentiary privileges, and its justification based on a public policy that promotes the giving of sound legal advice. Mohawk Br. 19, 27-30; DRI Br. 6-16. Those same sorts of things could be said for every other common-law privilege. For example, the psychotherapist-patient privilege is justified because it "serves the public interest by facilitating" mental health treatment, and the "mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee*, 518 U.S. at 11. And the spousal privilege is similarly justified because it "furthers the important public interest in marital harmony," *id.*, and has "ancient roots." *Trammel v. United States*, 445 U.S. 40, 43-44 (1980).

Mohawk and its *amici*, moreover, mischaracterize the purpose of the attorney-client privilege and exaggerate the scope and nature of its protection, wrongly suggesting that it embodies an absolute legal right not to disclose confidential information rather than a common-law evidentiary privilege that gives way in the face of competing concerns. *Compare* Mohawk Br. 11-12 ("right not to disclose privileged information"), *and* Chamber Br. 14 ("absolute"), *with* ABA Br. 6-12 (emphasizing that the privilege is not an absolute right against disclosure, but a "balance between the public interests served by the privilege and the competing interest in access to evidence").

The purpose of the attorney-client privilege is not to protect "confidentiality" for its own sake, Chamber Br. 14, and, indeed, confidentiality is not even a logical imperative of the privilege. *See* 1 Rice, *Attorney-Client Privilege* § 6:4, at 24 (section entitled "Confidentiality Not a Logical Imperative"). Instead, confidentiality is a byproduct of the goal of encouraging full and frank communication, which is itself subservient to the goal of encouraging sound legal advice and promoting the administration of justice. "[I]t is important not to confuse these overarching policy goals with the means of achieving them. Communication between counsel and client is not, in and of itself, the purpose of the privilege; rather, it only protects the free flow of information because it promotes compliance with the law and aids administration of the judicial system." *In re Teleglobe Comm'ns Corp.*, 493 F.3d 345, 360-61 (3d Cir. 2007); *see Zolin*, 491 U.S. at 563.

Nor is the attorney-client privilege absolute. Because it "has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976); *see Zolin*, 462 U.S. at 562. "The privilege cannot stand in the face of countervailing law or strong public policy and should be strictly confined within the narrowest possible limits underlying its purpose." *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991) (citing 8 *Wigmore on Evidence* § 2192, at 67 (3d ed.)). Thus, contrary to the suggestion of Mohawk and its *amici*, the attorney-client privilege confers nothing approaching an absolute legal entitlement to avoid disclosure, let alone a constitutional or statutory right, a well-established immunity, or a right not to stand trial.

### D. Orders Denying Claims Of Attorney-Client Privilege Are Not Effectively Unreviewable After Final Judgment.

The final requirement for collateral-order appeal under section 1291 is that the category of orders at issue would be "effectively unreviewable" and the rights at stake "irretrievably lost" after final judgment, such that strict observance of the final judgment rule "would render impossible any review whatsoever," *Ryan*, 402 U.S. at 533, or "would practically defeat the right to any review at all." *Flanagan*, 465 U.S. at 265 (quoting *Cobbledick*, 309 U.S. at 324-25).

This requirement cannot be applied mechanically because a case "can no more be untried than a law's proverbial bell can be unrung, and almost every pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history." *Digital*, 511 U.S. at 872. Instead, a practical analysis that takes into account both the importance of the rights at stake and the policy against piecemeal appeals is required. *Id.* This Court has given "erroneous evidentiary rulings" and "grants or denials of attorney disqualification" as examples of orders that are "only imperfectly reparable by appellate reversal of a final district court judgment" but nonetheless unappealable. *Id.* Orders denying attorney-client privilege, like other evidentiary rulings, may sometimes be "imperfectly reparable," but they are not "effectively unreviewable."

This Court has consistently held that "pretrial discovery orders" do not satisfy the effectively-unreviewable test in part because, even "in the rare case when appeal after final judgment will not cure an erroneous discovery order," a party can, as a last resort, pursue review via the *Cobbledick* disobedience-and-contempt procedure. *Firestone*, 449 U.S. at 377. Mohawk (at 25) contends that discovery orders rejecting attorney-client privilege claims should be treated differently because "the cat is already out of the bag" once disclosure occurs. But this Court has already held that concerns that reliance on review after final judgment would "'let the cat out,'" *Maness*, 419 U.S. at 463, leading to a "breach of [attorney-client] confidence," are no different from the harm resulting from "other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection." *Firestone*, 449 U.S. at 376-78.

In any event, "the argument that the cat is being let out of the bag could logically be made in any case where a court rejects" a privilege claim. *In re Weisman*, 835 F.2d 23, 26 (2d Cir. 1987). Unable to articulate some reason why attorney-client privilege claims should be elevated above all other rights and privileges subject to the *Cobbledick* rule, Mohawk attacks the rule itself, raising what it calls "fundamental problems" with an approach to which this Court has consistently adhered for more than one hundred years. Mohawk Br. 33-36 (describing the contempt requirement as "highly unpredictable" and "barbaric"). Accepting that argument would require this Court to overrule a century's worth of precedent, beginning with *Alexander*, *Cobbledick*, and *Ryan*. Even apart from that unattractive consequence, Mohawk's argument presents several independent problems.

First, Mohawk's argument rests on the false premise that a party faced with an order rejecting its privilege objection has only two choices: disclose the allegedly privileged material to the world, or risk contempt. The Federal Rules do not limit the parties' or the court's options in this way. The court, either with or without the agreement of the parties, can enter a restrictive protective order that prevents public disclosure. Indeed, in this very case, the district court ordered that depositions be filed under seal because they might contain material subject to attorney-client privilege. Pet. App. 26a. The Federal Rules also provide for a wide range of sanctions, such as (1) ordering that certain facts be taken as established; (2) precluding the opposition of certain claims or introduction of certain evidence; or (3) striking parts of pleadings. Fed. R. Civ. P. 37(b)(2). These "sanctions enumerated in the rule are not exclusive and arbitrary but flexible, selective, and plural," and the district judge is entrusted to make such orders "as are just." 8A Wright & Miller, *Federal Practice* § 2284, at 612. A sanction under Rule 37 would not require the party asserting the privilege to disclose the evidence to anyone (including opposing counsel) and would preserve its ability to seek review after final judgment.

Second, Mohawk's cat-out-of-the-bag argument rests on the same mischaracterization of the privilege that leads Mohawk to exaggerate its importance. Because the privilege is "instrumental or utilitarian," Mueller & Kirkpatrick, 2 *Federal Evidence* § 181, at 302 (2d ed. 1994), what matters are the incentives for frank communication created by the privilege, viewed from an *ex ante* perspective. *See Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998).[5] For that reason, "[t]he interests protected by the attorney-client privilege are not threatened by requiring [the appellant] to await final judgment." *United States v. Philip Morris, Inc.*, 314 F.3d 612, 624 (D.C. Cir. 2003) (Randolph, J., dissenting). A privilege dispute that turns on an exception or waiver, in particular, does "not affect the *ex ante* incentives for frank communication created by the attorney-client privilege" because "communication is facilitated so long as the client believes herself to be protected from disclosure at the time of communication." Miller, *The Costs of Waiver*, 83 N.Y.U. L. Rev. 1248, 1257 (2008). Moreover, "few trial court decisions rejecting claims of attorney-client privilege are reversed on appeal—erroneous disclosure is thus rare," *Chase*, 964 F.2d at 164, and so the costs of allowing appeals greatly outweigh any benefits. In any event, if the "cat" is the purportedly privileged material and the "bag" is what is preventing its use as evidence in the trial court proceedings, then the cat can be put back in the bag if an appellate court upholds the privilege and orders a new trial without use of the privileged material.

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[5] *See also* Farnsworth, *The Legal Analyst* 9 (2007) (citing the privilege as a classic example of an *ex ante* rule: "forcing the attorney to talk this time makes it less likely that a client will talk to an attorney next time"); Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4, 32-33 (1984) (discussing *ex ante* versus *ex post* analysis of evidentiary privileges).

In short, because confidentiality is a "condition precedent to the *creation* of the privilege" rather than "a requirement for its *continued* existence," "a delayed review is not inconsistent with the privilege." 2 Rice, *Attorney-Client Privilege* § 11:27, at 160-61 (emphasis in original). If this Court declines to create a new right to immediately appeal from privilege disputes, "clients' incentives to communicate frankly with their attorneys would remain as strong as ever." *Philip Morris*, 314 F.3d at 625 (Randolph, J., dissenting).

## III. OTHER ROUTES TO THE APPELLATE COURTS ARE AVAILABLE.

Mohawk's plea for immediate appeal overlooks the value of discretionary review as both a safety valve and a means of rationing limited appellate resources. Apart from options such as protective orders, Rule 37 sanctions, and the traditional contempt procedure, a party on the losing end of a privilege dispute "may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b)" or, "in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available." *Firestone*, 449 U.S. at 378 n.13.

Mohawk (at 37-38) points to *Helstoski v. Meanor*, 442 U.S. 500 (1979), which denied mandamus because the petitioner there could have appealed under *Cohen*, and contends that mandamus therefore provides no "alternative" for collateral-order review. This argument assumes the very thing it attempts to prove because mandamus is only categorically unavailable if collateral-order review is available.

Although most privilege decisions are too factbound and insignificant to qualify, *see, e.g.*, *Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 284 (2d Cir. 1967), mandamus can be "an escape hatch from the finality rule" when "a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment." *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987) (citation and quotation marks omitted). Notably, mandamus also allows appellate courts, in the rare case where it is necessary, to provide guidance concerning *procedures* for managing complex privilege disputes, without having to micromanage the document-by-document outcome of those disputes. *See Chase*, 964 F.2d at 164-65. In *In re Vioxx*, for example, after "[t]he district judge undertook the herculean task of personally reviewing 30,000 documents over a two-week period," the Fifth Circuit "examine[d] only the process, not the merit of the privilege claim on any single or group of documents" and "limited its response to suggesting a slight change of course." 2006 WL 1726675, at *2. That limited, commonsense approach quickly would be rendered meaningless if full-scale appeals were available as of right from every privilege ruling.

In the unusual case where a district court decides a central and important legal issue concerning the attorney-client privilege, and an early appellate determination is likely to expedite the case's final resolution, appellate certification may be available under 28 U.S.C. § 1292(b). This process allows courts to distinguish between "a typical attorney-client case inappropriate for interlocutory review," *Union County v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir. 2008), and the rare case where an expenditure of appellate resources before final judgment may be appropriate. *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002). Although "not a panacea," section 1292(b)'s availability is one factor counseling against expansion of *Cohen*. *Digital*, 511 U.S. at 883 & n.9.

Taken together, the availability of mandamus and certification mean that "the law is not without its safety valve to deal with cases where the contest over" attorney-client privilege "raises serious . . . questions taking the case out of the ordinary run." *Id.* at 883. The problem here is that Mohawk seeks review as of right squarely within the "ordinary run" of discovery disputes, running headlong into section 1291's ban on piecemeal review.

Finally, the history of appellate review of rulings on class certification underscores both the wisdom of discretionary review and why the rulemaking process, not *Cohen* expansion, is the rational way to consider whether to enlarge the interlocutory appellate docket. Rulings on class certification are often important. An order refusing certification may signify the case's practical demise because it terminates the action for the putative class and may render what remains—the named plaintiff's individual action—economically unsustainable. *See Coopers*, 437 U.S. at 469-70. On the other hand, an order granting certification "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Id.* at 476. Indeed, *Coopers* rejected interlocutory review of orders denying class certification in part because that would "operate[] only in favor of plaintiffs even though the class issue" "will often be of critical importance to defendants as well." *Id.*

But *Coopers* did not render the civil justice system powerless to address the reviewability of class-certification rulings. Acting under 28 U.S.C. § 1292(e), which authorizes rulemaking to expand the types of interlocutory orders subject to appellate review, the Civil Rules Advisory Committee studied the issue and embraced an approach that provides the courts of appeals with discretion to review orders denying or granting class certification. *See* Fed. R. Civ. P. 23(f). The Committee noted the genuine needs of both plaintiffs and defendants, but also observed that many class certification rulings "present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23(f), 1998 Adv. Comm. Notes. Rule 23(f) not only avoided the one-way street that would have resulted had *Coopers* expanded *Cohen* to orders denying, but not granting, class certification (as would occur here if the Court were to extend *Cohen* to orders rejecting, but not accepting, privilege claims), but it made review discretionary, thus refusing to unleash a large category of appeals and preserving the appellate courts' control over their own dockets. That discretionary option is not available under *Cohen*.

The rulemakers were also able to do something else that the courts cannot: They provided in Rule 23(f) that district court proceedings presumptively go forward during the appeal, thus ameliorating a key concern of the final judgment rule: delay and interference with the district court's ability to fairly and efficiently manage the litigation. This Court should not set down the scalpels of mandamus, certification, and rulemaking in favor of the hammer of collateral-order review.

## IV. THE RULE MOHAWK ADVOCATES HAS NO LIMITING PRINCIPLE, WOULD TAX ALREADY OVERBURDENED APPELLATE COURTS, AND HAS PROVED UNWORKABLE IN PRACTICE.

1. As Judge Wilkinson has observed, "a judicially created exception to nonappealability for categories of sensitive information is the quintessential slippery slope." *MDK*, 27 F.3d at 120. "Many parties faced with discovery requests are apt to regard the information sought as sensitive or confidential and seek, at a minimum, to delay its disclosure through an interlocutory trip to an appellate court." *Id.*

Absent the "limiting principles" of which finality jurisprudence is "sorely in need," *Gulfstream*, 485 U.S. at 292 (Scalia, J., concurring), an exception for waivers of attorney-client privilege would logically encompass all denials of attorney-client or work-product privilege, constitutional and common-law evidentiary privileges, and other antidiscovery interests, as well as disputes over protective orders. This Court has always "denied review of pretrial discovery orders," *Firestone*, 449 U.S. at 377, but Mohawk's exception would, case-by-case and category-by-category, swallow that rule—illustrating the "tendency of a principle to expand itself to the limit of its logic." Cardozo, *The Nature of the Judicial Process* 51 (1921). The other option would be arbitrary line drawing and ad hoc fact-based distinctions—anathema to *Cohen*'s emphasis on categorical rules—that would prove unworkable in practice and generate constant litigation over the scope of an ever-changing new incursion on section 1291.

Mohawk does not even attempt to offer this Court a limiting principle. Instead, it asserts that this case "is not and has never been about all claims of privilege" and vaguely suggests that "[o]ther privileges ... might be deemed less important." Mohawk Br. 39. Conspicuously lacking is any explanation of *why* orders denying attorney-client privilege claims must be treated differently from orders rejecting other privileges and antidiscovery interests. Mohawk also claims that this case involves only rulings on *waiver* of the privilege, but it never explains why it makes any sense to exclude trial court rulings on exceptions to the privilege or the existence of the privilege itself. *Id.* 39. In this case, as in many cases, the parties dispute whether the material is privileged *and* whether the privilege was waived, and both issues were briefed in the Eleventh Circuit. If Mohawk is correct that the question presented is limited to waiver, and if Mohawk were to prevail in this Court, the Eleventh Circuit on remand would have authority to rule on the waiver issue, but not on the underlying privilege issue. The absurdity of that outcome exposes Mohawk's failure to articulate a sensible categorical rule.

In seeking certiorari, Mohawk was more candid, acknowledging that the rule it seeks would go well "beyond the facts and parties to this case" and "expand[] to every litigant" that is "ordered to produce privileged information," Pet. 18—hardly a recipe for keeping the collateral order doctrine "narrow and selective in its membership." *Will*, 546 U.S. at 350.

2. A decision of this Court (as opposed to a circuit court) that entitles every discontented litigant in a privilege dispute to appeal immediately through the federal courts can be expected to open the floodgates. In an effort to reassure the Court through arithmetic, Mohawk (at 39-40) and *amicus* Chamber (at 30-35) count up the number of reported opinions in the three circuits that have recently begun experimenting with immediate appeals from discovery disputes and proclaim that there is nothing to worry about—that "while the court below feared a flood, empirical research shows barely a trickle." Chamber Br. 35.

Even assuming that a sound empirical prediction of the effect of an affirmance by this Court can be made based on the number of lower-court decisions, Mohawk and its *amici* are looking at the wrong numbers. The more relevant statistics are those reflecting the number of privilege claims denied every day in the federal district courts (all of which would be subject to immediate appeal under Mohawk's rule) and the already overburdened dockets of the federal appellate courts (which would be burdened further still under Mohawk's rule). The place to look for a prediction of the impact, in other words, is not what has been filed but what *could* be filed were this Court to give a green light to appeals from routine privilege disputes.[6]

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[6] In addition to encouraging appeals that otherwise would not have been pursued, a decision in favor of Mohawk here would also distort discovery negotiations. If parties could take their claims to an appellate court, district judges would lose their influence in (continued...)

**a.** Not surprisingly, there is a very high volume of litigation over the attorney-client privilege in federal district courts. A Westlaw search for the terms "attorney-client" and "privilege" in the "federal district courts" database between 2004 and 2009 produced a staggering 4,446 reported cases. To get a more detailed sense of the volume, we searched that database for those same terms in six two-month periods over the last three years and examined each case to learn whether the attorney-client issue was actually adjudicated (as opposed to being mentioned in passing or in relation to some other privilege) and whether disclosure was ordered. Our search revealed that, on a monthly basis, there are dozens of reported orders from which appeals might be taken in cases that run the gamut of the federal docket—from patent infringement to habeas, from ERISA to civil rights, from securities fraud to insurance coverage.[7]

**b.** A rule permitting immediate appeals from all of those privilege disputes would "threaten[] busy appellate

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(...continued)

hammering out a compromise. And the party asserting the privilege would possess a powerful bargaining chip: the threat of a costly and lengthy appeal. Perhaps most troubling, some parties would find it in their interest to be uncooperative, thus prolonging litigation, increasing judicial workload, and raising costs for clients.

[7] In the most recent two-month period surveyed, May-June 2008, there were 216 reported written decisions mentioning the attorney-client privilege, 93 decisions adjudicating an attorney-client privilege claim, and 46 disclosure orders. The previous two-month periods reflect similar volume: January-February 2008 (190, 92, 47), May-June 2007 (219, 97, 51), January-February 2007 (203, 100, 66), January-February 2006 (91, 38, and 21), and May-June 2006 (159, 64, 37). These numbers understate matters significantly because they reflect only decisions reported by one online service and exclude all oral rulings, such as those made in pretrial conferences, by phone during depositions, or in response to objections at trial.

courts with added numbers of essentially similar, if not repetitive, appeals, at a time when overloaded dockets threaten the federal appellate system." *Behrens*, 516 U.S. at 322 (Breyer, J., dissenting) (citing Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 31-51 (1994)).[8] Appellate workload continues to increase. Between 1999 and 2008, regional circuit filings rose 11.7 percent and pending appeals increased 25.7 percent.[9] Yet, since 1990, the number of authorized appellate judgeships has stayed constant at 179.

**3.** Until 1997, the federal courts of appeals "consistently held that disclosure orders are neither too important nor too independent of the cause of action itself to justify immediate appellate consideration." 2 Rice, *Attorney-Client Privilege* § 11:34, at 213 (footnotes omitted). Over the last dozen years, three circuits—the Third, Ninth, and D.C.—have broken, in varying degrees, from the nonappealability rule. The experience in these circuits does nothing to alleviate the concern that a similar ruling from *this* Court would unleash a deluge of new interlocutory appeals. But it does tell us something: that the rule advanced by Mohawk would undermine the policy against piecemeal appeals, lead to a series of amorphous exceptions to the final judgment rule, and encourage litigation simply to test the exceptions' parameters.

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[8] *See also* Posner, *The Federal Courts: Challenge and Reform*, 140-57, 160-75 (1996); King, *Current Challenges to the Federal Judiciary*, 66 La. L. Rev. 661, 667 (2006).

[9] *See* Administrative Office of the United States Courts, *2008 Annual Report to the Director: Judicial Business of the United States Courts*, 13, *available at* http://www.uscourts.gov/judbus2008/JudicialBusinespdfversion.pdf (hereinafter *2008 Judicial Business*).

**a.** The Third Circuit, in *In re Ford Motor Company*, 110 F.3d 954 (3d Cir. 1997), was the first to authorize collateral-order appeals of attorney-client privilege claims. Finding itself "bound by the holding[]" in *Smith v. BIC Corp.*, 869 F.2d 194 (3d Cir. 1989), which had extended *Cohen* to trade-secrets claims, *Ford* further extended the doctrine to cover attorney-client privilege claims. 110 F.3d at 964. Two years later, the court read *Ford* as embodying "a bright-line rule permitting appeals from discovery orders requiring the disclosure of content putatively privileged by the attorney-client and work-product privileges." *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 300 (3d Cir. 1999). Before long, however, the *Smith-Ford* approach began to exhibit internal inconsistencies and practical problems.

Just a year after *Montgomery County*, the court limited *Ford*'s holding "in light of the narrower approach to the collateral order doctrine taken by other courts of appeals." *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 55 (3d Cir. 2000). The question in *Bacher* was whether rulings regarding claims of highly sensitive but unprivileged information were immediately appealable. Influenced by this Court's statement in *Cunningham*, 527 U.S. at 206, that courts of appeals should not employ a "case-by-case approach," to collateral-order appeals, *Bacher* dismissed the appeal for lack of jurisdiction. 211 F.3d at 56. Though the appellants' arguments in *Bacher* were essentially the same as those made in *Ford*, the court unmistakably put on the brakes, acknowledging that "if we take jurisdiction here we may have difficulty drawing the jurisdictional line in future cases." *Id.* at 55.

The Third Circuit has spent the years since *Bacher* attempting to draw (and redraw) this arbitrary jurisdictional line. It has been confronted with multiple discovery appeals raising privilege claims, which it has had to dismiss on an ad hoc basis.[10] The continual case-by-case development of appealability jurisprudence in these cases has even caused the court to apply the *Cohen* test to the facts of specific attorney-client privilege disputes, despite its prior embrace of a bright-line rule. *See, e.g.*, *In re Teleglobe,* 493 F.3d at 357-58 (discussing "whether the privilege issue is sufficiently separate from the merits of the suit," but ultimately finding that "[i]n this context, we have little trouble concluding that we have jurisdiction over this appeal").

Last year, the Third Circuit indicated that it is growing weary of such difficult line drawing. In an appeal from an order granting partial trade-secrets protection, the court observed that *Bacher* "went to some length to cabin *Smith* and, to a lesser extent, *Ford*, to their specific fact situations." *In re Carco Elec.*, 536 F.3d 211, 213 (3d Cir. 2008). The court did not stop there, however. After acknowledging that "*Smith* has been widely criticized," the court highlighted the tension between its approach and recent precedent from this Court: "Admittedly, there are strong statements in both Supreme Court opinions [*Cunningham* and *Digital*] and, in particular, our opinion in *Bacher*, that seem to suggest that our holding in *Smith* is flawed. But, a reversal of *Smith* must be left to the wise counsel of the Court *en banc*." *Id.* at 214 (citation omitted). Nevertheless, the court proceeded to dismiss the appeal for lack of jurisdiction, distinguishing *Smith* on the theory that it does not apply to appeals concerning "the form or scope of the protection given," *id.*—a distinction that is hard to fathom.

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[10] *See, e.g.*, *Wexco Inds. v. ADM21 Co. Ltd.*, 260 Fed. Appx. 450 (3d Cir. 2008) (denial of request to obtain client's papers from prior attorney); *In re Horn*, 185 Fed. Appx. 199 (3d Cir. 2006) (dismissing appeal on grounds that work-product privilege claim was raised in a footnote in trial court); *In re Flat Glass Antitrust Litig.*, 288 F.3d 83 (3d Cir. 2002) (adhering to *Cobbledick* rule and dismissing appeal by nonparty witnesses claiming attorney work-product privilege); *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001) (denial of legislative privilege).

In sum, the Third Circuit has had a short-lived experience with the rule that Mohawk advocates, and that experience has been a failure.

**b.** The D.C. Circuit first adopted the *Smith-Ford* approach in 2003, in *Phillip Morris*, 314 F.3d 612. In dissent, Judge Randolph predicted that the rule would become unworkable and emphasized that the "costs of delay via appeal, and the costs to the judicial system of entertaining these appeals, exceed in the aggregate the costs of the few erroneous discovery orders that might be corrected were appeals available." *Id.* at 625 (quoting *Reise*, 957 F.2d at 295 (Easterbrook, J.)).

Judge Randolph's dissent has already proved prescient. After employing *Cohen* to grant a stay in *Philip Morris* itself, 314 F.3d at 615, the D.C. Circuit went on to consider three plenary interlocutory appeals concerning attorney-client privilege in the very same litigation. It took up the initial appeal flowing from the stay order, *United States v. Philip Morris, Inc.*, 347 F.3d 951 (D.C. Cir. 2003), and then a follow-on appeal after a remand to the district court—both concerning the question whether a party had waived the privilege by failing to include a single document on its privilege log. *United States v. British Am. Tobacco (Inv.) Ltd.*, 387 F.3d 884, 885 (D.C. Cir. 2004). Thereafter, in a particular affront to the final judgment rule, the court heard an interlocutory appeal from an order overruling objections to testimony during trial. *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235 (D.C. Cir. 2006).

Meanwhile, the rule has expanded to include the federal psychotherapist-patient and state-law medical-records privileges, *In re Sealed Case (Medical Records)*, 381 F.3d 1205 (D.C. Cir. 2004), and an appeal from a protective order based on a claim of confidential commercial information, *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892 (D.C. Cir. 2006). That development led Judge Rogers to express concern that the circuit's "liberality" was at odds with this Court's precedents and had created a slippery slope that "could open the way for immediate appellate review of all manner of discovery disputes." *Id.* at 900 (Rogers, J., concurring).

**c.** The Ninth Circuit followed *Ford* just two years ago in *Napster*, 479 F.3d 1078, and has already had difficulty drawing lines between privileges. *Napster* itself came on the heels of rulings allowing appeals from denials of the marital and peer-review privileges. *See United States v. Griffin*, 440 F.3d 1138 (9th Cir. 2006); *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005). Thus, although Mohawk claims (at 39) that "the narrow category at issue here" encompasses only "order[s] finding waiver of the attorney-client privilege," *Napster*, *Griffin*, and *Agster* show the conceptual difficulty in separating one type of privilege from another.

Even within the attorney-client privilege category, the Ninth Circuit has encountered problems. The year after *Napster*, the court dismissed an appeal from an order denying an attorney-client privilege claim over a single, inadvertently-disclosed email, creating an inadvertent-disclosure exception to what is supposed to be a categorical rule. *Truckstop.net, LLC v. Sprint Corp.*, 547 F.3d 1065, 1068 (9th Cir. 2008). The Ninth Circuit's collateral-order jurisprudence, then, allows immediate appeals from orders involving several different types of privileges, including the attorney-client privilege but not from the entire class of attorney-client privilege orders.

* * *

The experience of the courts that have allowed immediate appeals of attorney-client privilege denials has made clear the contradictions and inefficiencies involved with that approach. This Court should draw a lesson from their experience and put an end to the failed experiment.

## CONCLUSION

The decision below should be affirmed.

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# REPLY
# BRIEF

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No. 08-678

IN THE
# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

*Petitioner,*

*v.*

NORMAN CARPENTER,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# REPLY BRIEF

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## RULE 29.6 STATEMENT

The corporate disclosure statement in the Petition for a Writ of Certiorari remains accurate.

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# REPLY BRIEF FOR PETITIONER

The question presented in this case is whether, under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a party can immediately appeal a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information. Rather than address the question on which this Court granted certiorari, Carpenter literally rewrites the question presented, and at various points attempts to recast it to include immediate appeals of all pre-trial discovery rulings, all privilege rulings, and all attorney-client privilege rulings.

Carpenter's expansive treatment of the question presented is no accident. By broadening the category of cases at issue, Carpenter frees himself to argue against the application of *Cohen* to a broader and different category because his arguments otherwise falter on the actual question presented. Thus, rather than addressing the propriety of allowing an immediate appeal of an order compelling the production of attorney-client privileged information on the basis of a finding of waiver, Carpenter repeatedly substitutes other categories of orders. This effort distracts from the important issue in this case.

Carpenter argues that his alteration of the question presented is justified by this Court's instruction that collateral order jurisdiction is determined based on categories of cases and not the facts of any given case. *See e.g., Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("the issue of appealability under

[28 U.S.C.] § 1291 is to be determined for the entire category to which a claim belongs"). Carpenter's repeated arguments concerning general discovery orders, orders denying the existence of the attorney-client privilege, and orders involving other unrelated privileges simply obfuscates the proper delineation of the "category" at issue in this case and calls for the Court to reach an unnecessarily broad question without a disciplined adherence to the legal issue and context of the case before it. This is not a case about the existence of the attorney-client privilege, the importance of other unrelated privileges, or whether it is wise to permit the appeals of "discovery" orders generally.

Notably, this Court has resisted the overly broad (and advisory opinion prone) approach suggested by Carpenter and has instead limited its collateral order jurisdiction analysis to the legal issue presented by the district court order from which appeal is sought. *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 n.8 (1981) ("The Court of Appeals also stated that orders *granting* motions to disqualify counsel would be appealable under § 1291. That question is not presented by the instant petition, and we express no opinion on it . . . [or] whether an order denying a disqualification motion in a criminal case would be appealable . . ." (emphasis in original)); *Flanagan v. United States*, 465 U.S. 259, 260 (1984) (resolving immediate appeal question with respect to orders granting disqualification motions in criminal cases only); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440 (1985) (resolving immediate appeal question with respect to orders granting disqualification motions in civil cases). The sensibility of this approach is demonstrated by the fact that the *Cohen* analysis sometimes results in different conclusions with respect to different categories of cases within a single area of the law. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985) (permitting collateral order review for a category of denials of motions to dismiss or motions for summary judgment in qualified immunity cases); *Johnson v. Jones*, 515 U.S. 304 (1995) (rejecting collateral order review for a category of denials of motions for summary judgment in qualified immunity cases). Thus, although the Court's analysis of whether a particular claim is immediately appealable under the collateral order doctrine is not limited to the facts of a given case, the analysis is (and should be) limited to the legal issue presented.

Here, notwithstanding Carpenter's claims to the contrary, the only category of cases at issue is district court orders that require the disclosure of attorney-client privileged information on the basis of a finding of waiver. When applied to this appropriately specified category of cases, the *Cohen* analysis permits immediate appeal.

## I. The Requirements for Collateral Order Jurisdiction are Satisfied.

Carpenter contends that the District Court's order does not satisfy the three *Cohen* factors and does not implicate rights sufficiently important to warrant immediate review. As set forth below, Carpenter's arguments in this regard largely ignore the question presented and are contrary to this Court's prior decisions concerning both the collateral order doctrine and the attorney-client privilege.

### A. The Question Presented is an Issue of First Impression.

As a threshold matter, Carpenter incorrectly asserts that the Court need not even consider whether collateral order review is available because prior decisions hold that orders enforcing discovery requests are not immediately appealable. While Carpenter suggests that the issue presented in this case has been settled for more than a century, the cases he relies upon do not address collateral order jurisdiction and its application to orders compelling the disclosure of attorney-client privileged information on the basis of waiver. Indeed, two of the cases relied on by Carpenter, *Alexander v. United States*, 201 U.S. 117 (1906) and *Cobbledick v. United States*, 309 U.S. 323 (1940), predate *Cohen* itself. As such, they can hardly be said to settle any questions concerning the applicability of the doctrine in this or any other case. Rather, these cases simply stand for the proposition that, absent the practical construction of Section 1291 first articulated in *Cohen*, the orders at issue in those cases were not "final" and could not be immediately appealed.

The remaining cases relied on by Carpenter are similarly unavailing. For instance, *Church of Scientology v. United States*, 506 U.S. 9 (1992), *Maness v. Meyers*, 419 U.S. 449 (1975), and *United States v. Ryan*, 402 U.S. 530 (1971), did not include an analysis of the collateral order doctrine. Indeed, the language Carpenter relies on as a "rule" purportedly enunciated in *Church of Scientology* is but dicta in a footnote at the end of the Court's opinion that omits any reference to the collateral order doctrine. 506 U.S. at 18 n.11. Likewise, there is no discussion of the collateral order doctrine in the Court's opinions in *Maness* or *Ryan*. In those cases, the Court relied on the need for expedition in the administration of the *criminal law* to justify putting the complaining party to a choice between compliance with an order to produce information or disobedience and contempt prior to any appellate review of the order. In both cases, the Court emphasized that it had:

> consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.

*Maness*, 419 U.S. at 460; *Ryan*, 402 U.S. at 533. Thus, in addition to including no analysis of the collateral order doctrine, the holdings in *Maness* and *Ryan* were specifically limited to the context of criminal proceedings.[1]

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[1] Carpenter also suggests that rulemaking alone is the appropriate way to expand appellate review. Resp. Br. 18. This argument, however, essentially challenges the viability of the collateral order doctrine itself and calls into question decades of application of the doctrine by this Court. The argument also ignores that the collateral order doctrine exists as a "practical construction" of Section 1291, not as an exception to it. *Digital Equip. Corp.*, 511 U.S. at 867.

### B. The District Court's Order Implicates Important Rights that Merit Collateral Order Review.

District court orders finding waiver of the attorney-client privilege and compelling the disclosure of privileged information involve rights that are sufficiently important to merit collateral order review. This Court has repeatedly made clear the critical role that the privilege plays not only in the attorney-client relationship but also in maintaining a healthy judicial system. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Court's opinions confirm that the attorney-client privilege is not just important in "a general sense" (Resp. Br. 32), but also that it is sufficiently important in the *Cohen* sense.

In *Swidler*, the Court held that maintaining the strength of the attorney-client privilege, even following the death of the client, was important enough to reject a proposed limited exception in criminal cases where the privileged materials could exonerate the defendant. *See* 524 U.S. at 408-09. Certainly, if even the posthumous application of the attorney-client privilege has been deemed sufficiently important to outweigh the public interest in the accused being permitted access to evidence to defend their innocence, then it is sufficiently important when compared with the policy favoring limited interlocutory appeals.

In attempting to downplay the importance of the attorney-client privilege, Carpenter (along with the United States) relies on the cases in which this Court rejected collateral order jurisdiction for orders regarding attorney disqualification motions. *See* Resp. Br. 34; United States Br. 14. His position is essentially that if the right to choose a particular attorney is not subject to immediate appeal under *Cohen*, then the protection afforded to privileged communications with one's counsel should not be deemed sufficiently "important" to satisfy that *Cohen* criterion. The critical flaw in this logic is that the reasoning in the attorney disqualification cases did not turn on the "importance" of the attorney-client relationship, much less the logically distinct attorney-client privilege, but instead those decisions held that the would-be appellant did not satisfy other elements of the *Cohen* analysis.

In *Firestone*, the Court held that there was no collateral order jurisdiction for orders denying motions to disqualify opposing counsel in a civil case. In reaching this decision, the Court reasoned that "[a]n order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment" – the third *Cohen* element – as the court of appeals could simply "vacate the judgment appealed from and order a new trial." 449 U.S. at 377-78. Similarly, in *Flanagan* and *Richardson-Merrell* the Court held that immediate appeals could not be taken from orders disqualifying counsel in criminal and civil cases, respectively, because such orders were either reviewable on appeal or otherwise not completely separate from the merits – the second and third *Cohen* elements. *See Flanagan*, 465 U.S. at 268 ("[I]f establishing a violation of their asserted right requires no showing of prejudice to their defense, a pretrial order violating the right does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'"; "[T]he second *Coopers & Lybrand* condition – that the order be truly collateral – is not satisfied if petitioners' asserted right is one requiring prejudice to the defense for its violation"); *Richardson-Merrell*, 472 U.S. at 438, 440 ("[W]e conclude that orders disqualifying counsel in civil cases, as a class, are not sufficiently separable from the merits to qualify for interlocutory appeal").

Given the Court's express holdings that the attorney disqualification orders did not meet other prongs of the *Cohen* analysis, no amount of importance could have been sufficient to permit collateral order jurisdiction. Thus, the rejection of the collateral order doctrine in those contexts does not support Carpenter's argument that the attorney-client relationship is insufficiently important for collateral order review.[2]

In a similarly erroneous attempt to dilute the importance of the attorney-client privilege, Carpenter paints the privilege as tentative and subject to a balancing test to determine its application ("a common-law evidentiary privilege that gives way in the face of competing concerns"), going so far as to state that "the attorney-client privilege confers nothing approaching an absolute legal entitlement to avoid disclosure." *See* Resp. Br. 35-36. While it is generally true that the privilege "applies only where necessary to achieve its purpose" (Resp. Br. 36)[3], it does not follow that application of the attorney-client privilege is discretionary or subject to denial based merely on a desire for evidence. Such an approach was explicitly rejected in *Swidler*, where the Court found that introducing such uncertainty into application of the privilege was unacceptable even when the client was no longer alive. *See* 524 U.S. at 408-09[4] ("Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."). Moreover, Carpenter's portrayal of the rights conferred by the attorney-client privilege directly conflicts with this Court's admonition in *Upjohn* that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U.S. at 393.

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[2] Carpenter notes that in *Firestone* the Court rejected an argument for immediate appeal based on "'the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of [attorney-client] confidence' by opposing counsel, and the effect of such a tainted proceeding in frustrating public policy." Resp. Br. 15 (citing *Firestone*, 449 U.S. at 376). The Court, however, rejected this argument because the petitioner merely hinted that there could be a breach of confidence and failed "to supply a single concrete example of the indelible stamp or taint of which it warn[ed]." 449 U.S. at 376. There is no such failure in this case.

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[3] In arguing that confidentiality is not a "logical imperative" of the attorney-client privilege, Carpenter relies upon a treatise that is critical of the current formulation of the attorney-client privilege and calls for "[o]penly abolishing the confidentiality requirement." *See* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 6.4 at 28 (2d ed. 1999). Regardless of criticisms that may exist in the literature on the attorney-client privilege, no party or amicus has suggested that this case presents an occasion for the Court to revisit its long-standing precedent linking confidentiality and the attorney-client privilege.

[4] The *Swidler* opinion's discussion of the breadth of the confidences protected by the attorney-client privilege further emphasizes the privilege's importance. *See* 524 U.S. at 407-08 ("Clients consult attorneys for a wide variety of reasons . . . Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice.").

In suggesting that the attorney-client privilege is not a sufficiently important right, Carpenter and the United States also both attempt to draw bright-line rules unsupported by the Court's precedent. Carpenter asserts that collateral order jurisdiction should not be extended to any additional categories of orders where the right at issue is not grounded in a constitutional or statutory provision. This position is contrary to the Court's prior statements that the collateral order doctrine may extend to rights "deeply rooted in public policy" or of "a good pedigree in public law," and its refusal to reject the possibility that it could even extend to rights provided by private agreements. *See Digital Equip. Corp.*, 511 U.S. at 875, 879, 884. Moreover, it defies reason to suggest that a long-standing common law right that is recognized and applied in every jurisdiction in the country – and consistently held to be a critical component for a healthy judicial system – is somehow automatically categorically less important than any right embedded in a statutory provision.

In similar fashion, the United States (which also wrongly expands the category of cases at issue) attempts to graft a "volume" limitation onto the importance analysis, essentially claiming that if an issue comes up too frequently (the United States offers no standard for determining this threshold) then it cannot be sufficiently important. This Court has not adopted this additional criterion, which would improperly link importance with frequency as a prong of the *Cohen* analysis. Not only is there no case law to support this proposed limitation, but the fact that the Court has permitted collateral order appeals in qualified immunity cases demonstrates that the frequency with which an issue may arise is irrelevant. Indeed, while Carpenter asserts that "[a] Westlaw search for the terms 'attorney-client' and 'privilege' in the 'federal district courts' database between 2004 and 2009 produced a staggering 4,446 reported cases" (Resp. Br. 47), running the same search parameters with the term "qualified immunity" returns 10,000 cases (the maximum result permitted for a Westlaw search).[5]

### C. The District Court's Order Satisfies Each of the *Cohen* Factors.

In addition to implicating rights sufficiently important for collateral order review, district court orders finding waiver of the attorney-client privilege and compelling the production of privileged information satisfy each of the three *Cohen* factors.

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[5] With respect to interlocutory appeals, the Chamber of Commerce reports that in the time since the Third Circuit's decision in *Kelly v. Ford Motor Co.* (*In re Ford Motor Co.*), 110 F.3d 954 (3d Cir. 1997), that court has confronted 78 appeals from denials of qualified immunity in contrast to only six appeals involving compelled disclosure of privileged materials. *See* Chamber of Commerce Br. 8.

### 1. The District Court's Order Conclusively Determines the Disputed Question.

The District Court's order satisfies the first *Cohen* factor, because it conclusively determines the disputed question. Simply put, there is nothing left to determine nor anything to re-visit once there has been a finding of waiver and the production of the privileged materials has been compelled. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13 n.14 (1983) (holding that the first *Cohen* criterion is satisfied unless "some revision might be reasonably expected in the ordinary course of litigation"). Indeed, as recognized by the Eleventh Circuit below, the order "leaves no room for the district court to further consider whether the information at issue is protected." Pet. App. 8a. Notably, even the United States agrees on this point. *See* United States Br. 17 n.3 ("a district court's order compelling disclosure of documents after rejecting any privilege-based objection presumably constitutes the district court's final determination of the privilege issue").

Carpenter nevertheless takes the position that the first *Cohen* criterion is not satisfied because the district court could reconsider its decision upon disobedience of the order and a motion for contempt. *See* Resp. Br. 20. According to Carpenter, this "'second look' procedure is especially apt for privilege disputes" because it affords *in camera* review of any documents at issue. *See* Resp. Br. 22. Carpenter's argument on this point is flawed in multiple respects. First, as noted previously, he wrongly changes the category of cases at issue to include all "privilege disputes," rather than focusing on orders finding waiver of the privilege. This is important because it is not realistic that the suggested "second look" would cause a district court to change its decision that a waiver has occurred. Indeed, Carpenter's contention that a district court might change its initial ruling based on an *in camera* review of the documents claimed to be privilege has no application in the context of an order finding waiver. This is clear in the present case as the District Court's finding of waiver is based on statements contained in a publicly filed brief from another case.

Furthermore, under Carpenter's proposed approach, it would only be after the district court considered the issue a second time and held the violating party in criminal contempt that the issue would be "conclusively determined." By that time, however, collateral jurisdiction would be unnecessary as the criminal contempt citation would constitute an appealable final judgment. Thus, Carpenter's position (which involves extensive reliance on contempt cases (*see, e.g.*, Resp. Br. 20)) turns the *Cohen* analysis on its head by requiring that a party obtain an appealable final judgment (a criminal contempt citation) in order to satisfy the conclusiveness requirement set forth in the first prong of the collateral order doctrine. Such an approach would abolish the collateral order doctrine entirely.

### 2. Privilege Questions are Separate From the Merits.

Carpenter's arguments on the second prong of the *Cohen* test – separability – are similarly ineffective. "[T]he *Cohen* 'separability' component asks whether the question to be resolved on appeal is 'conceptually distinct from the merits of the plaintiff's claim.'" *Behrens v. Pelletier*, 516 U.S. 299, 309 n.3 (1996). An order finding waiver of the attorney-client privilege and compelling the production of privileged information resolves an issue that is "conceptually distinct" from the claims of the underlying lawsuit.

In the present case, the Eleventh Circuit correctly held that it could "resolve the privilege issues (*i.e.*, whether [Mohawk] must produce the disputed documents and communications)" without considering the merits of Carpenter's claims against Mohawk. *See* Pet. App. 8a. This is true not only for this case, but is generally true in the context of orders finding waiver of the attorney-client privilege. The analysis in such cases will turn on the applicable waiver law and the circumstances of the alleged waiver, rather than on any determination or analysis of the merits of the particular claims or defenses in the case.

In another attempt to create a dispute where the Eleventh Circuit found none, Carpenter contends that the "separability" element could never be met in any circumstance where the court might need to review the nature of the proceedings or the allegations in the pleadings. *See* Resp. Br. 25 (arguing that the "requirement is not met whenever the issue presented

. . . requires the court 'to review the nature and content of th[e trial court] proceedings.'"). Carpenter's proffered approach, however, was specifically rejected by the Court in *Mitchell*, 472 U.S. 511. There, in extending the collateral order doctrine in the context of qualified immunity, the Court held that the issue was "conceptually distinct from the merits" even though the district court would necessarily reference the plaintiff's pleadings. Understanding the context of the claims did not require the district court to "consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Mitchell*, 472 U.S. at 528. Moreover, the *Mitchell* decision noted that reference to the underlying allegations of the litigation was necessary for a variety of recognized collateral orders. *See id.* ("[R]esolution of these legal issues will entail consideration of the factual allegations . . . the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit . . . [under] the Speech and Debate Clause.").

Perhaps most significantly, the *Mitchell* decision expressly confronted and rejected the narrow view now offered by Carpenter:

> In advancing its view of the "separate from the merits" aspect of the *Cohen* test, Justice Brennan's dissent fails to account for our rulings on appealability of denials of claims of double jeopardy and absolute immunity. If, as the dissent seems to suggest, any factual overlap between a collateral issue and the

> merits of the plaintiff's claim is fatal to a claim of immediate appealability, none of these matters could be appealed, for all of them require an inquiry into whether the plaintiff's (or, in the double jeopardy situation, the Government's) factual allegations state a claim that falls outside the scope of the defendant's immunity. . . .
>
> Contrary to Justice Brennan's suggestion, the *Richardson-Merrell* Court's alternative holding that the issue of disqualification of counsel in a civil case is not separate from the merits is not based only on the fact that the issue involves some factual overlap with the merits of the underlying litigation. Rather, the Court in *Richardson-Merrell* observes that the question whether a district court's disqualification order should be reversed may depend on the effect of disqualification (or nondisqualification) on the success of the parties in litigating the other legal and factual issues that form their underlying dispute. Accordingly, the propriety of a disqualification order–unlike a qualified immunity ruling–is not a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case.

*Id.* at 529 n.10. Thus, the propriety of collateral order jurisdiction is in no way threatened by Carpenter's assertions that waiver issues may "require[] the court to 'review the nature and content'" of the case (Resp. Br. 26 n.2), may involve "an assessment of the types of claims and defenses asserted" (Resp. Br. 30), or may "require[] the court . . . to analyze the scope of the claims or defenses" (Resp. Br. 30). Each of these falls far short of any substantive determination regarding the merits of the underlying lawsuit.

The Court's rejection of a more restrictive approach is consistent with the purpose of the separability requirement, which is to avoid repetitive appeals of substantive issues. *See Johnson*, 515 U.S. at 311 ("The requirement . . . means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once . . ."); *Van Cauwenberghe v. Biard*, 486 U.S 517, 527-28 (1988) ("Allowing appeals from interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case."). A district court order finding waiver of the attorney-client privilege and compelling the production of privileged information would not risk any such repetitive review of substantive issues in the case. As illustrated by the District Court's order in this case, and confirmed by the Eleventh Circuit, the waiver issue can be ruled on by the district court and reviewed by the circuit court without any discussion of the merits of the underlying claims and defenses.

### 3. Once the Privileged Communications are Disclosed, the Order is Effectively Unreviewable on Appeal From a Final Judgment.

With respect to the final prong of the *Cohen* analysis – that the order be "'effectively unreviewable on appeal from a final judgment,'" *Sell v. United States*, 539 U.S. 166, 176 (2003) – Carpenter argues that an order finding waiver of the attorney-client privilege and compelling the production of privileged information, like any "pretrial discovery order," can be corrected on appeal by ordering that the privileged information not be used in the retrial of the case. Carpenter's overly simplistic approach ignores not only a fundamental aspect of the attorney client-privilege (the ability to communicate with one's attorney without fear of disclosure), but also that the utility of privileged materials to the opposing side often extends beyond mere evidentiary use of the materials (for example, gaining insight into the other side's litigation strategies).

The patent insufficiency of the remedies available on appeal from a final judgment has been acknowledged repeatedly even in circuits that have rejected collateral order review in this context. *See, e.g., In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1183 (10th Cir. 2006) ("'[i]n most cases disclosure makes meaningful review impossible because after disclosure whatever privilege attaches would be worthless.' . . . 'Any subsequent review, even after limited disclosure, would be for naught, because the damage would already be accomplished. Thus, appellate review of the claim would be meaningless.'" (*quoting Barclaysamerican Corp. v.*

*Kane*, 746 F.2d 653, 655 (10th Cir. 1984) and *United States v. West*, 672 F.2d 796, 799 (10th Cir. 1982))); *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 472 (6th Cir. 2006) ("an appeal after the disclosure of privileged communication is an inadequate remedy"); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992) ("At best, an attorney can assure the client that the communication, although made known to adversaries, will not be admissible . . . This . . . will not suffice to ensure free and full communication by clients who do not rate highly a privilege that is operative only at the time of trial.").

Thus, when the Third Circuit permitted collateral order review in *Ford*, Judge Becker aptly noted, "once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed . . . underlying the attorney-client privilege is the policy of encouraging full and frank communications between an attorney and client, without the fear of disclosure, so as to aid in the administration of justice." *Ford*, 110 F.3d at 963 (citation omitted).

Carpenter suggests that a protective order limiting disclosure to opposing counsel would somehow protect Mohawk or other parties faced with a waiver order. This proffered solution likewise ignores the fundamental problem that, regardless of the scope of the protective order, the privileged materials will still be disclosed to opposing counsel (likely one of the last people to whom any party would want to disclose privileged materials – *see* ABA Br. 15-16). Again, even courts that reject collateral order jurisdiction recognize that a protective order is an inadequate remedy. *See, e.g., Chase*

*Manhattan Bank*, 964 F.2d at 164 ("[A] litigant claiming the privilege would probably prefer almost anyone other than adversary counsel to review the documents in question. The attorneys'-eyes-only condition . . . allows one kind of critical disclosure – to opposing counsel in litigation – that the privilege was designed to prevent."). Thus, a protective order ignores the significant and undeniable harm that arises from giving opposing counsel the opportunity to review the legal advice sought or requested regarding the very issues involved in the litigation.[6]

## II. The Alternative Avenues for Review Identified By Carpenter Are Inadequate and Do Not Preclude Collateral Order Jurisdiction.

Carpenter contends that Mohawk has "other routes" to the appellate courts instead of collateral order review. But these suggested alternative avenues to appellate review present neither a likely nor efficient means to preserve the protections afforded by the attorney-client privilege.

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[6] The suggested protective order approach also does nothing to address the issues confronting a party involved in multiple related lawsuits who is found to have waived the privilege in one of the cases. This was exactly the situation for the appellants in *Ford*, 110 F.3d 954, and *United States v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003), and is likewise the reality that Mohawk confronts here. *See* Pet. Br. 26-27; Chamber of Commerce Br. 17, 23-25.

### A. Disobedience and Contempt Is Not an Adequate Alternative to Collateral Order Review.

Throughout their briefs, Carpenter and his supporting *amici* argue that "disobedience and contempt" is a reasonable and proper approach for Mohawk to challenge the District Court's order. This argument ignores the practical and legal reality that a party cannot simply disobey, be held in contempt, and then appeal. Unlike non-parties, a party to a lawsuit can only appeal a criminal contempt citation. *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) ("The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt."). Thus, a party confronted with an adverse waiver order would not have the simple option of defying the order and appealing the resulting contempt order, but instead would have to defy the order and hope for a criminal contempt citation rather than a civil contempt citation.[7]

It is unlikely, though, that a party violating an order to produce privileged documents would be held in criminal contempt.[8] As an initial matter, a district court could be expected to issue a punishment designed to coerce compliance (*i.e.*, production of the documents). Any such citation designed to coerce would be deemed a civil contempt order upon an attempted appeal, regardless of the designation provided by a district court. *See Shillitani v. United States*, 384 U.S. 364, 369-70 (1966) ("The fact that both the District Court and the Court of Appeals called petitioners' conduct 'criminal contempt' does not disturb our conclusion . . . their sentences were clearly intended to operate in a prospective manner–to coerce, rather than punish. As such, they relate to civil contempt." (citations omitted)). Moreover, a civil contempt order is often viewed as the appropriate remedial measure for noncompliance with a discovery order. Indeed, the Eleventh Circuit has said, "[a] finding of a failure to comply with discovery orders is a finding of civil contempt." *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1147 (11th Cir. 2006).

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[7] Another possibility is that the disobedience could result in the issuance of sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure, which likewise would not be subject to an immediate appeal. Carpenter's suggestion of a Rule 37 sanction as an alternative to collateral order review is somewhat transparent. The Rule 37 sanction would not provide a path to appeal, but would instead require Mohawk to litigate the remainder of the case with the handicap of whatever unpredictable negative inference, admission of adverse facts, or stricken defenses or pleadings the district court chooses.

Even if a district court were inclined to issue a criminal contempt citation, this Court has indicated that, pursuant to the "least possible power" doctrine, trial courts are required to consider the feasibility of coercive civil contempt penalties prior to issuing a criminal contempt citation. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987); *Shillitani*, 384 U.S. at 372 n.9. Only when it becomes clear that the civil fines/imprisonment will not result in compliance would a criminal contempt citation be issued, which may not occur for months or even years. Moreover, the criminal contempt proceedings may themselves be laborious, because criminal contempt is a crime in the ordinary sense and therefore its issuance is subject to constitutional due process requirements. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994). Therefore, the suggestion that "disobedience and contempt" is a reasonable or predictable path to appeal is incorrect.

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[8] In their *amicus* brief supporting Carpenter, the Former Article III Judges and Law Professors concede that criminal contempt orders in this context "will – and should – be rare." Fmr. Judges Br. 24 n. 14.

### B. Mandamus and Review Under 1292(b) Are Also Inadequate Alternatives to Collateral Order Review.

The potential availability of mandamus provides no basis for rejecting collateral order jurisdiction. *See Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979) (holding that mandamus is not "the appropriate vehicle" for seeking review of an adverse order when collateral order review is available). Moreover, from a practical perspective, the high standard of review and the circuit courts' apparent inconsistent application of mandamus in the context of waiver of the attorney-client privilege render it merely an illusory option. *Compare Powerhouse*, 441 F.3d at 471-73 (reviewing substance of privilege waiver issue on mandamus petition, finding no clear error, but stating that "the scope of the attorney-client privilege implicates the kind of important interests that would normally favor mandamus") *with United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 473-74 (6th Cir. 2006) (rejecting mandamus petition without consideration of substance of waiver issue, and stating that mandamus may only be used for such orders in an "extraordinary case")[9] *and* Pet. App. 14a-15a (holding, without substantive review of the privilege waiver issue, "[e]ven if we were to conclude that the district court had erred in finding that Mohawk waived the attorney client privilege, Mohawk still has not shown that its right to the issuance of the writ is clear and indisputable."). Given multiple circuit courts' hostility to mandamus petitions from even erroneous orders finding a waiver of the attorney-client privilege, mandamus cannot reasonably be considered an alternative avenue for immediate review.

Carpenter also suggests that some parties could seek an appeal under 1292(b). *See* Resp. Br. 42. But this is not an alternative to collateral order review. Indeed, they are conceptual opposites. Interlocutory appeals under 1292(b) are for issues involving "controlling question[s] of law" that "materially advance" the litigation. 28 U.S.C. § 1292(b). The collateral order doctrine, on the other hand, applies to orders that "determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. That Carpenter and the United States concede that an order finding waiver of the attorney-client privilege will rarely, at best, involve a "controlling question of law" that "materially advance[s]" the litigation, only serves to further support the conclusion that such orders are, in fact, collateral orders.

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[9] That *Powerhouse* and *Pogue* were decided by the same circuit within weeks of each other in 2006 underscores the inconsistency and uncertainty of mandamus petitions in the context of waiver of the attorney-client privilege. The volume and length of recent mandamus cases involving the attorney-client privilege support collateral order jurisdiction, because it would provide a more uniform and orderly approach to appellate review.

## III. A Decision in Mohawk's Favor Will Not Give Rise to a Flood of Interlocutory Appeals.

Carpenter urges that a decision in Mohawk's favor will cause a flood of interlocutory appeals because, absent some limiting principle, Mohawk's proposed application of the collateral order doctrine "would logically encompass all denials of attorney-client or work-product privilege, constitutional and common-law evidentiary privileges, and other anti-discovery interests, as well as disputes over protective orders." Resp. Br. 44. In this regard, Carpenter contends that no principled distinctions can be drawn between orders finding waiver of the attorney-client privilege and orders concerning the various other types of privileges and discovery disputes that might arise in any given case. Resp. Br. 10. This line of argument is misguided in numerous respects.

First, Carpenter's "slippery slope" argument is simply a variation on his efforts to rewrite the question presented so that it encompasses other categories of cases that are broader and more common than the issue presented in this case. Carpenter undertakes to expand the question presented to invoke the specter of a flood of appeals and to task Mohawk with explaining how every type of conceivable privilege order would or would not be immediately appealable under *Cohen*. As previously explained, however, this Court's analysis for purposes of collateral order jurisdiction, evidenced by its treatment of cases in the context of qualified immunity and attorney disqualification, is limited to the legal issue presented through the district court order from which an appeal is sought, and not the infinite number of legal issues that might eventually be – but are not currently – before the Court.

Furthermore, to the extent necessary, "principled distinctions" can be drawn between orders finding waiver of the attorney-client privilege and orders concerning the various other types of privileges and discovery disputes. This is exactly the type of value judgment applied in a collateral order case. *See Will v. Hallock*, 546 U.S. 345, 351 (2006) ("boils down to 'a judgment about the value of the interests'" (quoting *Digital Equip. Corp.*, 511 U.S. at 878-79)). For instance, the Court can conclude that certain other common law privileges are less important to the proper and fair administration of the judicial system than the attorney-client privilege and therefore not sufficiently important for purposes of collateral order jurisdiction. By way of example, the Court might conclude that the spousal privilege, which is applied differently depending on the context in various jurisdictions, is not sufficiently important under the *Cohen* analysis. Of course, such a decision would be based on the arguments made, evidence offered, or facts and circumstances present for that category of orders.

Likewise, principled distinctions may be drawn between orders finding waiver of the attorney-client privilege and orders denying the existence of the privilege. As a practical matter, the legal analysis conducted by the district court (and appellate court) in assessing whether the attorney-client privilege has been waived is wholly different than the analysis required to determine whether the attorney-client privilege exists. This fact is readily demonstrated by the District Court's two-pronged analysis in the present case.

Additionally, a principled distinction may be drawn between waiver orders and other attorney-client privilege orders in the context of the *Cohen* framework. Indeed, it is for this very reason that Carpenter repeatedly substitutes other categories of privilege orders in his analysis of the *Cohen* factors. With respect to the conclusiveness prong of the analysis, Carpenter argues that orders holding that the attorney-client privilege does not apply to documents are inherently tentative because they are prone to a "second look" which could include *in camera* review. As discussed above, though, the same rationale does not apply to orders finding waiver. Once the district court finds waiver, there is no reason to believe that the district court will revise its ruling in the ordinary course of litigation. Therefore, if the Court were to accept Carpenter's argument with respect to orders denying the existence of the privilege, such orders may be distinguished from waiver orders with respect to the "conclusiveness" prong.

In similar fashion, in discussing the separability prong, Carpenter discusses, at some length, orders applying the crime fraud exception to the attorney-client privilege, and argues that the orders applying the crime-fraud exception almost always include a specific finding based on the allegations of liability before the district court. Again, this argument does not apply to orders finding waiver of the attorney-client privilege, which need not include any consideration of the merits.

Moreover, orders finding a waiver of the attorney-client privilege may also be distinguished on the basis that they are more important in the *Cohen* sense than orders finding that the attorney-client privilege does not apply in the first instance. An order finding that the attorney-client privilege has been waived generally results in the disclosure of information that the court has already determined would otherwise be protected by the attorney-client privilege. Thus, there is no question that the disclosure will, in fact, cause harm that cannot be remedied on an appeal from a final judgment. Further, the purported waiver can extend beyond a specific document or documents and encompasses entire subject matters or even the entirety of the attorney-client relationship. As such, orders finding that the privilege has been waived are inherently more damaging to a party – and more desirable to the opposing party – than an order denying the applicability of the privilege in the first instance to a given document or set of documents.

These distinctions show that allowing collateral order jurisdiction here does not logically encompass all other cases compelling the production of information claimed to be protected by the attorney-client privilege or some other privilege.[10]

## CONCLUSION

For the foregoing reasons and those set forth in the initial Brief for Petitioner, the Court should reverse the judgment of the Eleventh Circuit Court of Appeals dismissing Mohawk's appeal and hold that, under the collateral order doctrine established in *Cohen*, a party can immediately appeal a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information.

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[10] In any event, even if orders concerning the applicability of the attorney-client privilege in the first instance were "logically encompassed" in the category of cases at issue here, Carpenter's floodgates argument is illusory. As noted in Mohawk's initial brief, a review of the opinions published in the Federal Reporter and those included in the Federal Appendix from the three circuits that have recognized collateral order jurisdiction in this context (the Third, Ninth, and D.C. Circuits) reveals that since *Ford* was decided in 1997, these circuits have exercised collateral order jurisdiction in a total of approximately eleven appeals in which the appellant sought immediate review of an order compelling a party to disclose information claimed to be protected by the attorney-client privilege. *See* Pet. Br. 40.

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# AMICUS
# CURIAE
# BRIEF

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No. 08-678

# In the Supreme Court of the United States

MOHAWK INDUSTRIES, INC., PETITIONER

*v.*

NORMAN CARPENTER

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether a party has the right to an immediate appeal under the collateral order doctrine, as set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), from a district court's order finding waiver of the attorney-client privilege and compelling production of privileged materials.

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# In the Supreme Court of the United States

No. 08-678

MOHAWK INDUSTRIES, INC., PETITIONER

*v.*

NORMAN CARPENTER

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

## INTEREST OF THE UNITED STATES

This case presents the question whether the collateral order doctrine permits immediate appeal of a district court's finding of waiver of the attorney-client privilege. As the Nation's most frequent litigator in federal court, the United States has a substantial interest in proper resolution of the question presented. The government litigates the applicability of the attorney-client privilege in discovery disputes, as well as the applicability of the collateral order doctrine in a variety of other contexts. Additionally, resolution of the question presented has potential implications for the immediate appealability of orders pertaining to unique governmental privileges.

## STATEMENT

1. In 2004, a group of individuals (not parties to the present dispute) filed a class action lawsuit against petitioner, *Williams* v. *Mohawk Indus., Inc.*, No. 4:04-cv-00003-HLM (N.D. Ga. filed Jan. 6, 2004), alleging that petitioner (a carpet manufacturer) had unlawfully depressed the wages of its legally employed workers through a pattern of racketeering activity by knowingly employing, harboring, and encouraging entry of illegal aliens. J.A. 50-52. During the pendency of the *Williams* action, petitioner hired respondent as a shift supervisor at one of its manufacturing facilities and subsequently terminated him. J.A. 54, 61. Respondent brought suit in federal court against petitioner and certain of its executives, alleging that he had informed petitioner's human resources department that it was employing illegal aliens; that petitioner's outside counsel had sought to compel him to recant his statements in order to insulate the company from liability in *Williams*; and that when he had refused, petitioner had terminated his employment based on pretext. Pet. App. 3a-4a; J.A. 48-66. Respondent sought recovery under 42 U.S.C. 1985(2) (conspiracy to deter him from testifying in *Williams*) and under various Georgia laws. Pet. App. 3a; J.A. 66-78.

Shortly after respondent filed suit, the plaintiffs in *Williams* sought an evidentiary hearing to explore the allegations in respondent's complaint. Pet. App. 4a. In its response to that motion, petitioner offered its account of the "true facts" behind respondent's termination. *Ibid.* Petitioner represented that respondent had "engaged in blatant and illegal misconduct" in circumvention of federal immigration laws; that petitioner had commenced an investigation of respondent's conduct and claims; that "[a]s part of that investigation" petitioner's outside counsel had interviewed respondent; and that, as a result of respondent's misconduct, petitioner had fired him. *Id.* at 4a-5a; see J.A. 208-211.

Respondent subsequently sought to compel production of information relating to his meeting with petitioner's outside counsel, as well as information relating to petitioner's decision to terminate his employment. Pet. App. 5a-6a, 22a. The district court granted respondent's motion to compel. *Id.* at 29a-54a. The court held that the information at issue was protected by the attorney-client privilege, *id.* at 36a-42a, but that petitioner had impliedly waived the privilege through its response to the *Williams* plaintiffs' request for an evidentiary hearing, *id.* at 43a-51a. The district court explained:

> By making those representations, [petitioner] placed the actions of [petitioner's outside counsel] in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between [petitioner's outside counsel] and [respondent] and between [petitioner's outside counsel] and [petitioner's] personnel. Consequently, the Court must conclude that [petitioner] has waived the attorney-client privilege with respect to the communications relating to the interview of [respondent] and the decision to terminate [respondent's] employment.

*Id.* at 6a, 51a. The district court stayed its order pending appeal. *Id.* at 52a.

2. The court of appeals dismissed petitioner's appeal for lack of jurisdiction under 28 U.S.C. 1291, holding that the challenged discovery order did not qualify for immediate review under *Cohen* v. *Beneficial Indus-*

*trial Loan Corp.*, 337 U.S. 541 (1949). The court explained that "[u]nder *Cohen*, an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." Pet. App. 7a-8a.

The court held that an order finding waiver of the attorney-client privilege and compelling production of the underlying information satisfied the first and second elements of *Cohen*'s test. Pet. App. 8a. The court held, however, that the district court's order did not satisfy *Cohen*'s third element, reasoning that attorney-client privilege rulings could effectively be reviewed after final judgment by vacating any tainted verdict and ordering a retrial without the use of the privileged evidence. *Id.* at 8a-9a.

The court also relied on circuit precedent rejecting collateral order review for denials of the accountant-client privilege in the discovery context. Pet. App. 10a-11a. Emphasizing the "potentially large volume of appeals [that] may arise out of such discovery orders" and the "powerful prudential reasons to avoid commonplace interlocutory appeals," the court noted that aggrieved parties possess adequate alternative avenues of review, including a petition for a writ of mandamus and an appeal of a contempt order imposing sanctions for declining to produce the assertedly privileged material. *Id.* at 13a.

The court of appeals then denied petitioner's companion mandamus petition, reasoning that even if the district court had erred in holding the privilege waived, petitioner "still ha[d] not shown that its right to the issuance of the writ [was] clear and indisputable." Pet. App. 15a.

## SUMMARY OF ARGUMENT

Discovery orders finding waiver of the attorney-client privilege do not warrant immediate appeal under the collateral order doctrine. In addition to failing the second and third requirements of the traditional *Cohen* test, these numerous and routine orders are insufficiently important to outweigh the strong interest against pre-finality appeals.

A. In its more recent cases applying the collateral order doctrine, the Court has emphasized that the class of eligible orders must remain "narrow and selective in its membership" and limited to cases where delaying review would "imperil a substantial public interest." *Will* v. *Hallock*, 546 U.S. 345, 347-353 (2006). While some orders adjudicating rights "embodied in a constitutional or statutory provision" or having a similarly "good pedigree in public law" (such as qualified immunity) are entitled to immediate review, orders adjudicating other rights are not. *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 875, 879 (1994). This Court's precedents have long denied collateral-order review to typical discovery orders because of the potential for undue delay arising from countless automatic appeals. The Court generally has insisted, as a filtering mechanism, that a party must instead disobey the disclosure order and appeal the resulting contempt order or pursue mandamus or an appeal under 28 U.S.C. 1292(b).

B. Although the attorney-client privilege serves an important purpose, it is not of constitutional or other exceptional public-law pedigree. And the instrumental interest in encouraging "full and frank communication" between client and counsel is not materially undermined by denying collateral order review of a finding of waiver. The sheer volume and garden-variety nature of production orders involving assertions of the attorney-client privilege cut against petitioner's contention that those orders are categorically of such special significance as to warrant immediate review.

Such orders also do not satisfy the traditional requirements of the collateral order doctrine. A finding of waiver of the attorney-client privilege is ordinarily not "completely separate from the merits of the action." Whether the attorney-client privilege has been waived—which may depend on a determination of the unfairness to the opposing party of litigating the merits without the privileged information—often will require an assessment of the significance of the privileged information to the merits.

Nor is an order finding a waiver of attorney-client privilege "effectively unreviewable on appeal from a final judgment." Several reasonable alternatives exist: Assuming a party complies, a district court may enter a protective order barring disclosure prior to trial, and an appeals court can vacate an adverse final judgment and exclude the use of any tainted evidence in a retrial. Assuming non-compliance, a district court may issue, in lieu of an immediately appealable contempt order, other sanctions short of contempt that preserve a party's right to appeal. And, in especially important or egregious cases, a party can pursue a mandamus petition or an interlocutory appeal under 28 U.S.C. 1292(b). Should experience demonstrate that those various alternatives are inadequate, Congress—or the Court, pursuant to its rulemaking authority, see 28 U.S.C. 1292(e)—may classify attorney-client privilege orders as immediately appealable.

Although denials of the attorney-client privilege do not meet the Court's stringent standards for collateral-order review, denials of certain governmental privileges—in light of their constitutional grounding, rare invocation, and unique importance to governmental functions—should qualify for immediate appealability. In particular, the ordered disclosure of a Presidential communication or state secret would more directly and irremediably harm the purpose of the corresponding privilege (*i.e.*, preserving confidentiality of top-level Executive Branch communications or protecting national security) than would disclosure of attorney-client privileged information.

## ARGUMENT

### DISCOVERY ORDERS FINDING WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE DO NOT WARRANT IMMEDIATE APPEAL UNDER THE COLLATERAL ORDER DOCTRINE

The Court should apply in this case the same principles that it has applied in its more recent cases addressing the collateral order doctrine. That analysis requires, as part of or in addition to consideration of the traditional *Cohen* factors, an inquiry into the relative importance of the interest at stake—according special weight to interests of constitutional dimension or other substantial public interests. Thus, for example, the Court has found denials of immunity under the Speech or Debate Clause, absolute or qualified immunity of federal officials, state sovereign immunity, and the assertion of the Presidential communications privilege to be immediately appealable under Section 1291. Applying that framework here, discovery orders concerning the attorney-client privilege—voluminous in quantity and often mundane in nature—are not subject to immediate appeal under the collateral order doctrine. But this is not to say that no denial of a claim of privilege could satisfy the Court's stringent standards. Privileges that are at once rarely invoked and of substantial constitutional significance under the separation of powers would merit immediate appeal under the Court's framework, even though assertion of the privilege might arise in the discovery context.

### A. The Collateral Order Doctrine Is Limited To A Small Class Of Orders Implicating Sufficiently Compelling Constitutional Or Other Public Interests

"Section 1291 of Title 28, U.S.C., gives courts of appeals jurisdiction over 'all final decisions' of district courts" not immediately appealable to this Court. *Behrens* v. *Pelletier*, 516 U.S. 299, 305 (1996). The Court has given Section 1291's requirement of a "final decision[]" a "practical rather than a technical construction," *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), so as to extend "appellate jurisdiction over 'a narrow class of decisions that do not terminate the litigation,' but are sufficiently important and collateral to the merits that they should 'nonetheless be treated as final.'" *Will* v. *Hallock*, 546 U.S. 345, 347 (2006) (quoting *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). So understood, Section 1291 encompasses orders "conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action'" that are "'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Id.* at 349 (quoting *Behrens*, 516 U.S. at 305; *Cohen*, 337 U.S. at 546).

The Court has applied a three-pronged test to determine whether a class of orders may qualify for immediate appeal under the "collateral order doctrine." The orders must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.* (*P.R. Aqueduct*), 506 U.S. 139, 144 (1993) (brackets in original) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). The Court has emphasized in its more recent cases that in order to preserve the important policies of judicial efficiency that underlie the finality requirement of Section 1291, the class of collateral orders must remain "narrow and selective in its membership" and limited to cases where later review would "imperil a substantial public interest." *Hallock*, 546 U.S. at 350, 353; see *id.* at 350 ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope."). As petitioner acknowledges (Br. 16), it must establish that the class of orders is sufficiently important to justify immediate appeal. See *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495, 503 (1989) (Scalia, J., concurring) (framing inquiry as whether right to be vindicated is "sufficiently important to overcome the policies militating against interlocutory appeals").

Several types of orders that the Court has held subject to immediate appeal under the collateral order doctrine involve a party's "entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity); see *Osborn* v. *Haley*, 549 U.S. 225 (2007) (Westfall Act certification); *P.R. Aqueduct*, *supra* (Eleventh Amendment immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity); *Helstoski* v. *Meanor*, 442 U.S. 500

(1979) (Speech or Debate Clause immunity); *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy). One premise of these decisions is that such a right would be "effectively lost if a case [were] erroneously permitted to go to trial." *Forsyth*, 472 U.S. at 526. But the right to immediate appeal in such cases stems not merely (or necessarily) from "a right to avoid trial" as such, but as well from "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Hallock*, 546 U.S. at 350, 351-352 (citation omitted). The Court has thus denied immediate review of other collateral orders implicating a right to avoid trial, such as orders regarding application of the Federal Tort Claims Act's judgment bar to preclude constitutional tort actions against federal officers, *id.* at 354-355; rescission of a private settlement agreement that would otherwise prohibit suit, *Digital Equip.*, 511 U.S. at 873; and denial of dismissal based on asserted immunity from civil process for extradited persons and on *forum non conveniens* grounds, *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988).

Similarly, while the Court recently has permitted immediate review under the collateral order doctrine of orders implicating compelling interests of constitutional dimension, see *Sell* v. *United States*, 539 U.S. 166, 175-177 (2003) (forced medication of a prisoner to make him competent to stand trial), it has more often denied such review when important but non-constitutional interests are at stake, see, *e.g.*, *Cunningham* v. *Hamilton County*, 527 U.S. 198 (1999) (discovery sanctions order); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424 (1985) (disqualification of counsel in civil case); *Coopers & Lybrand*, *supra* (order denying class certification).

In reconciling its modern collateral order precedents, the Court has explained that the doctrine applies only where the question considered implicates "some particular value of a high order," such as "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, [or] mitigating the government's advantage over the individual." *Hallock*, 546 U.S. at 352-353. It is thus not merely an immediate interest, but "a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable." *Id.* at 353. In assessing the substantiality of particular rights, the Court has made clear that those "originating in the Constitution or statutes" are to be shown particular solicitude. *Digital Equip.*, 511 U.S. at 879. While orders adjudicating certain rights "embodied in a constitutional or statutory provision" or having a similarly "good pedigree in public law" (such as qualified immunity) may be entitled to immediate review, orders adjudicating lesser interests are not. *Id.* at 875, 879.

Although the relevant inquiry does not categorically exclude discovery orders from the collateral order doctrine, "[a]s a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review." *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992). This Court's precedents have long treated discovery orders differently because of their sheer volume, their often routine nature, and the potential that appeals from such orders would cause undue delay. The Court typically has stated that a party must disobey the disclosure order and appeal the resulting contempt order as a means of filtering disputes that justify immediate review. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971) ("[T]he necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal."); *Behrens*, 516 U.S. at 319 (Breyer, J., dissenting) ("disobedience and contempt" requirement for discovery claims serves "to limit appeals to issues that are both important and reasonably likely to lead to reversal") (quoting 15B Charles Alan Wright et al., *Federal Practice & Procedure* § 3914.23, at 154 (2d ed. 1992)).

Application of the collateral order doctrine to the discovery context must be sensitive to the concerns expressed in those precedents. See, *e.g.*, *Cunningham*, 527 U.S. at 209 ("Not only would [immediate appeals of discovery sanctions] ignore the deference owed by appellate courts to trial judges charged with managing the discovery process, it also could forestall resolution of the case.") (citing *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)). Because the doctrine should "never be allowed to swallow the general rule" of a single post-judgment appeal, any allowance of an immediate appeal in the discovery context must be narrow and limited to issues of such importance as the Court has found necessary in recent cases. *Hallock*, 546 U.S. at 350 (quoting *Digital Equip.*, 511 U.S. at 868).

### B. Orders Resolving Attorney-Client Privilege Disputes Do Not Qualify For Immediate Appeal Under The Collateral Order Doctrine

The question remains whether discovery orders to produce information based on a finding that the attorney-client privilege has been waived satisfy the traditional *Cohen* criteria and implicate a sufficiently compelling interest to justify immediate appeal. Given the volume and nature of such orders, the answer should be no.

### *1. Discovery orders requiring disclosure of material allegedly subject to the attorney-client privilege do not as a class implicate an interest of a sufficiently high order*

a. The attorney-client privilege is not "embodied in a constitutional or statutory provision" or in "public law." *Digital Equip.*, 511 U.S. at 875, 879. Rather, like most discovery privileges, its origins are in common-law practice. While it is one of the oldest of such privileges, see *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981), its modern evolution has been marked by an increasing array of exceptions designed to narrow the privilege's scope. See 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 503.10[2], at 503-13 (2d ed. 2009) (*Weinstein*) ("[T]he modern trend generally has been towards broader disclosure, manifested in ever-expanding provisions for discovery.").

The purpose of the attorney-client privilege is to promote "the observance of law and administration of justice" by encouraging "full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389. All parties can agree that this purpose is important. But for a class of orders to be immediately appealable, more is necessary. Here, the harm to the attorney-client relationship resulting from unjustified disclosure of their communications must outweigh the substantial costs of permitting pre-final-judgment appeals in all cases finding a waiver of the privilege.

The Court has not found other protections of the attorney-client relationship to justify immediate appeal. Fundamental to this relationship is, of course, the right to retain an attorney of one's choosing. Indeed, for a criminal defendant, that right is protected by the Sixth Amendment. See, *e.g.*, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). Yet an order infringing upon that interest cannot be immediately appealed. See *Flanagan* v. *United States*, 465 U.S. 259, 267 (1984) (order disqualifying criminal defense counsel not appealable under collateral order doctrine); *Richardson-Merrell*, 472 U.S. at 435 (order disqualifying civil counsel not appealable under collateral order doctrine). When disqualification of chosen counsel, potentially in violation of the Constitution, does not give rise to an immediate appeal, denial of a common-law claim of privilege designed to strengthen the attorney-client relationship cannot be thought to do so.

Although petitioner acknowledges that the Court's recent cases make clear that "a determination of the importance of the legal right at issue" is "central" to the collateral order inquiry (Br. 16), petitioner nevertheless relies on earlier collateral order cases when considering the relative importance of the interests at stake (*id.* at 30-31). Those earlier cases, however, offer little analysis of the importance of the right in question and appear to have placed much less weight on that factor.[1] Petitioner's contention that the interests asserted here are "of equal importance" to those in the early collateral order cases thus has little relevance for today's inquiry.

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[1] See *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12-13 (1983) (order staying action pending resolution of previously filed state court action); *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 347 n.8 (1978) (order allocating to class action defendants costs and expenses of identifying class members); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171-172 (1974) (order imposing costs of notice on class action defendant); *Stack* v. *Boyle*, 342 U.S. 1, 6 (1951) (order

In any event, for reasons explained later, the interest in encouraging "full and frank communication" between client and counsel is not materially undermined by requiring the holder of the privilege to pursue the traditional avenue of post-judgment appellate review (or where appropriate, mandamus or Section 1292(b) interlocutory review). See Pt. B.2.b, *infra.*

b. The sheer volume and routine nature of most discovery disputes involving assertions of the attorney-client privilege also cut against the immediate appealability of judicial orders resolving them. See Resp. Br. 47 & n.7 (surveying district court decisions that adjudicate attorney-client privilege disputes). Allowing immediate appeal of these decisions would potentially prolong much federal-court litigation and thereby undermine Section 1291's finality requirement.[2]

There are no structural restraints on the assertion of attorney-client privilege claims. Some litigants may seek a tactical advantage by asserting and then appealing attorney-client privilege claims, even if they are of

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denying reduced bail); *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 688-689 (1950) (order vacating attachment of vessel in admiralty action); *Cohen*, 337 U.S. at 545-547 (order refusing to apply state statute requiring posting of bond).

[2] Petitioner states (Pet. Br. 21, 39) that it seeks only a rule that would permit immediate appeal of findings of waiver of the attorney-client privilege. But petitioner provides no principled basis on which to limit the rule it seeks to waivers of the attorney-client privilege as opposed to denials of the applicability of the privilege in the first place. Regardless, petitioner's position at least covers all orders finding a waiver on any basis—itself a significant category.

little import or merit. See, *e.g.*, *MDK, Inc.* v. *Mike's Train House, Inc.*, 27 F.3d 116, 120 (4th Cir. 1994) ("Many parties faced with discovery requests are apt to regard the information sought as sensitive or confidential and seek, at a minimum, to delay its disclosure through an interlocutory trip to an appellate court."); cf. *Cunningham*, 527 U.S. at 210 (Kennedy, J., concurring) ("Delays and abuses in discovery are the source of widespread injustice; and were we to hold sanctions orders against attorneys to be appealable as collateral orders, we would risk compounding the problem.").

Even the threat of such appeals (with the accompanying delay and expense) could substantially alter the course of discovery and inhibit the district court's ability to control the process. That is why the collateral order doctrine, especially in the discovery context, "emphasizes the deference that appellate courts owe to the trial judge" and seeks to avoid "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals." *Cunningham*, 527 U.S. at 203 (quoting *Firestone Tire & Rubber*, 449 U.S. at 374).

Petitioner (Br. 39-40) and its amici (Chamber of Commerce (CoC) Br. 30-35) assert that only a relatively small number of appeals of attorney-client privilege disputes appear to have arisen in the three circuits that currently allow immediate review of such orders. But that may simply reflect a combination of the relatively recent nature of those precedents and uncertainty as to the precise class of orders entitled to collateral order review in those circuits. In any event, there is good reason to expect that immediate appeals would become substantially more common—both in those circuits and others—if this Court were to announce a uniform rule allowing immediate appeal in all such cases throughout the federal courts.

### 2. *An order finding waiver of the attorney-client privilege is not sufficiently separate from the merits or effectively unreviewable in other ways*

An order requiring disclosure of information based on a finding of waiver of attorney-client privilege also does not satisfy the traditional requirements of the collateral order doctrine—in particular, the second ("important issue completely separate from the merits of the action") and third ("effectively unreviewable on appeal from a final judgment"). *Coopers & Lybrand*, 437 U.S. at 468.[3]

a. The relative importance of attorney-client privilege disputes has already been addressed (see pp. 13-16, *supra*). That leaves only the latter part of the second prong: whether rulings resolving attorney-client privilege disputes are sufficiently separate from a suit's merits. That requirement "is a distillation of the principle that there should not be piecemeal review of steps towards final judgment in which they will merge." *Van Cauwenberghe*, 486 U.S. at 527 (internal quotation marks and citation omitted). It is designed to avoid "repetitive appellate review of substantive questions" by precluding review of "interlocutory orders that involve considerations enmeshed in the merits of the dispute." *Id.* at 528. Orders that require a court to "scrutinize the substance of the [underlying] dispute * * * to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action," are not sufficiently separate from the merits of the case to satisfy the collateral order doctrine. *Ibid.*

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[3] We do not address the first element—whether the order "conclusively determines the disputed question"—because a district court's order compelling disclosure of documents after rejecting any privilege-based objection presumably constitutes the district court's final determination of the privilege issue. Respondent (Br. 19-22) raises the "disobedience and contempt" option as providing a further opportunity for the district court to revisit the privilege issue. Because any such reconsideration would be discretionary, the government believes that option should be addressed as an independent limiting principle (see pp. 11-12, *supra*) or as part of the third prong of the *Cohen* test (*i.e.*, whether the denial of the privilege is "effectively unreviewable" without the collateral order doctrine, see p. 25, *infra*).

Discovery sanctions, for example, ordinarily are not collateral orders because they "may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response." *Cunningham*, 527 U.S. at 205. Class action assessments of typicality, commonality, and adequacy of representation are also too closely linked to the merits of a case to be considered collateral. See *Coopers & Lybrand*, 437 U.S. at 469 n.12. Orders disqualifying civil counsel are likewise insufficiently separable from the merits because they might require assessing the likely effect of an attorney's prior conduct or future testimony on trial proceedings. See *Richardson-Merrell*, 472 U.S. at 439-440.

Petitioner (Br. 21), like the court of appeals, contends that the second *Cohen* factor requires only that the disputed issue can be resolved "without *deciding* the merits of the case." Pet. App. 8a (emphasis added). But under that standard, the orders in all three of the above cases would have satisfied the second *Cohen* factor, since none of them actually required the district court to decide the merits.[4]

Although the inquiry as to whether information is protected by the attorney-client privilege in the first place generally does not implicate the merits of the underlying suit, the further question whether that privilege was waived often does. A determination that the attorney-client privilege has been waived by implication —directly at issue here—will ordinarily require the district court to assess the significance to the litigation of the privileged information put into play by the client. See 3 *Weinstein* § 503.41[1], at 503-105 (describing "waiver by implication" as "plac[ing] protected information in issue for personal benefit through some affirmative act," such that applying the privilege would be "manifestly unfair to the opposing party"). One common example is where a client asserts reliance on the advice of counsel as part of its defense, thereby making the privileged communications a substantive issue in the litigation. See 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:44, at 213-214 (rev. 2d ed. 2007). A court's waiver-by-implication inquiry—in determining the unfairness to the opposing party of litigating the merits without the privileged information relied upon by the client—thus implicates the underlying merits at least as much as the classes of orders that the Court has already held insufficiently collateral to warrant immediate appeal.

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[4] As petitioner notes (Br. 22), the question of qualified immunity might also be said to overlap with the merits of an underlying dispute. The Court nevertheless has distinguished its immunity-related rulings from orders (such as those referred to in the text) the resolution of which may depend on the effect the order has on "the success of the parties in litigating the other legal and factual issues that form their underlying dispute." *Forsyth*, 472 U.S. at 529-530 n.10. This case falls into that latter category.

The same holds true for waivers of the attorney-client privilege based on other grounds. For instance, a party may contend that its opponent's intentional disclosure of certain privileged information warrants a finding of waiver with respect to related but undisclosed privileged information. Federal Rule of Evidence 502(a) provides that, for intentional disclosures of attorney-client privileged information in a federal proceeding or to a federal agency, the waiver's scope depends in part on whether undisclosed material "ought in fairness to be considered together" with the disclosed information. That analysis requires an assessment of the merits of a case to determine the practical effect of withholding the material at issue. See Fed. R. Evid. 502 explanatory note ("[A] party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.").

The crime-fraud exception to the attorney-client privilege also often implicates the merits of the underlying case. Under that exception, the attorney-client privilege "does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States* v. *Zolin*, 491 U.S. 554, 563 (1989) (citation omitted). In criminal cases, the alleged crime or fraud supporting the exception may well overlap with conduct related to the charged offense. See Resp. Br. 27-29 & n.4 (collecting cases). In such cases, determining the applicability of the crime-fraud exception would require a preview of the merits.

Although petitioner suggests (Br. 20-21) that the district court *in this case* did not assess the merits of respondent's suit, that is far from clear. In finding waiver, the district court explained that by making representations regarding its investigation and outside counsel's interview of respondent, petitioner had "placed the actions of [petitioner's outside counsel] in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between [petitioner's outside counsel] and [respondent] and between [petitioner's outside counsel] and [petitioner's] personnel." Pet. App. 51a. That "fairness" determination was necessarily premised on the district court's assessment of the relevance of the privileged communications to the merits of respondent's claims.

In any event, the Court has rejected "a case-by-case approach to deciding whether an order is sufficiently collateral," *Cunningham*, 527 U.S. at 206, and instead asks simply whether "many" orders of the sort at issue may be intertwined with the merits of a case, *Richardson-Merrell*, 472 U.S. at 439. Whether the class of orders here is limited to waivers by implication, or extends more broadly to encompass all waivers of and exceptions to the attorney-client privilege, a sufficient number of such orders are enmeshed in the merits of a dispute to render them non-collateral as a categorical matter. See *Cunningham*, 527 U.S. at 206; *Richardson-Merrell*, 472 U.S. at 439.

b. Attorney-client privilege disputes also are not "effectively unreviewable on appeal from a final judgment." As the decision below explains, established procedures exist to remedy the litigation effects of an erroneous waiver ruling and disclosure following appeal from final judgment: a reviewing court may "reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information." Pet. App. 8a-9a.

Petitioner contends (Br. 23-27) that because a party cannot "unlearn" disclosed information, review following final judgment cannot eliminate the litigation effects of an erroneous waiver ruling. But courts routinely confront the need to prevent a party from using improperly obtained evidence, not only in the discovery context but also in criminal prosecutions. Faced with the fruits of unconstitutional searches and seizures, as well as confessions, courts have developed longstanding rules to ensure that the prosecution cannot make use of knowledge that it would not possess but for improperly obtained information or evidence. See, *e.g.*, *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985) ("The *Wong Sun* doctrine applies as well when the fruit of the Fourth Amendment violation is a confession."); *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963) (verbal evidence derived from an unlawful entry or unauthorized arrest excluded as "fruit of the poisonous tree"); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920) (copies and photographs of documents obtained through illegal search and seizure inadmissible as derivatives of excluded evidence). While those remedies are available following appeal from a final judgment, a district court's denial of a pre-trial motion to suppress such information is not appealable under the collateral order doctrine. See *DiBella* v. *United States*, 369 U.S. 121, 131 (1962).

If vacating an adverse judgment and excluding the use of any tainted evidence is adequate to guarantee the rights of a criminal defendant, it is difficult to see why those remedies would be inadequate for a civil litigant. Indeed, the procedures afforded by Federal Rule of Evidence 502(b) and Federal Rule of Civil Procedure

26(b)(5)(B), which provide for the return and non-use of privileged documents inadvertently disclosed to an opposing party, are premised on the adequacy of such an approach.

Petitioner (Br. 25) and its amici (CoC Br. 18-21) also contend that the attorney-client privilege protects against the disclosure of information itself and not only its subsequent use at trial. But the attorney-client privilege does not rest on the premise that confidentiality is an end in itself; rather, confidentiality is a means of furthering a generalized societal goal of "encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. In any event, a post-judgment order that unwinds the litigation consequences of an erroneously ordered disclosure of attorney-client privileged material would serve to mitigate any impact on the ex ante incentives for "full and frank communication"—the privilege's limited instrumental objective. See *Swidler & Berlin* v. *United States*, 524 U.S. 399, 407 (1998). And given that a district court's resolution of an attorney-client privilege dispute presumably would be infrequently reversed on appeal anyway, any impact on those ex ante incentives would be marginal. See *United States* v. *Philip Morris Inc.*, 314 F.3d 612, 625 (D.C. Cir. 2003) (Randolph, J., dissenting) (noting "the few erroneous discovery orders that might be corrected were appeals available") (quoting *Reise* v. *Board of Regents*, 957 F.2d 293, 295 (7th Cir. 1992)).

The case for immediate review is even more attenuated for *waivers* of attorney-client privilege. Such rulings do not require consideration of the core elements of attorney-client privilege, but rather concern the consequences of a party's or attorney's subsequent conduct with respect to the privileged communications. That context is at least one step removed from the communication between attorney and client that the privilege seeks to promote. Accordingly, any impact on the ex ante incentives for "full and frank communication" is considerably diminished. See *Philip Morris Inc.*, 314 F.3d at 625 (Randolph, J., dissenting) ("If we did not hear the appeal, clients' incentives to communicate frankly with their attorneys would remain as strong as ever. The only possible change would be that clients might be more careful to hire attorneys who comply rigorously with the discovery rules.").

Petitioner and its amici nonetheless speculate that without immediate appeal of disclosure orders, the interests underlying the attorney-client privilege will be undercut in a variety of ways: individuals will be less forthcoming with their attorneys (CoC Br. 20-21); "corporations may be less likely to engage in internal investigations" (Pet. Br. 29); and society will suffer "a breakdown not only in attorney-client relations, but in the regulatory system that Congress envisioned and the Executive adopted" (DRI Br. 4). But a significant majority of circuits have never permitted collateral order review of attorney-client privilege disputes, and the rulings in the three circuits that have are recent. Yet neither petitioner nor its amici offer any evidence that the grave consequences they predict have come to pass in any of those jurisdictions.

In those rare instances in which attorney-client communications are sufficiently sensitive that an erroneously ordered disclosure cannot be remedied effectively on appeal after final judgment, other avenues of relief are available. The availability of those avenues counsels against permitting automatic piecemeal review via the collateral order doctrine of all disclosure orders arising out of attorney-client privilege disputes. See, *e.g.*, *Firestone Tire & Rubber*, 449 U.S. at 378 n.13 ("Although there may be situations in which a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of an order denying its motion to disqualify opposing counsel, it is not necessary, in order to resolve those situations, to create a general rule permitting the appeal of all such orders. * * * [A] party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b), * * * and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available.").

As an initial matter, compliance with a disclosure order does not mean that the allegedly privileged information must be made available to the whole world. The district court may enter a protective order, shielding the information from public use (at least until trial). Alternatively, the party invoking the privilege may refuse to comply with a disclosure order. Although the district court may hold a non-compliant party in contempt and impose sanctions—which could give rise to a right of immediate appeal (see pp. 11-12, *supra*)—district courts regularly impose sanctions short of contempt, such as allowing the trier of fact to treat a contested fact as established. See Fed. R. Civ. P. 37(b)(2)(A)(i). That compromise may be worthwhile to a party possessing the allegedly privileged information in some cases, because it would preserve the right to appeal after final judgment while not disclosing the information.

In any event, where the district court's error "amount[s] to a judicial usurpation of power, or a clear abuse of discretion," a party may seek relief through a petition for a writ of mandamus. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citation omitted). As the court of appeals correctly recognized, "[u]tilizing the writ of mandamus, as opposed to the collateral order doctrine, as the appropriate avenue to seek review of discovery orders involving claims of privilege strikes an appropriate balance between the concerns of furthering the important policies of full and frank communication sought to be furthered by the privilege and the concerns of judicial efficiency." Pet. App. 13a; see *Cunningham*, 527 U.S. at 211 (Kennedy, J., concurring) ("If * * * the result is an exceptional hardship itself likely to cause an injustice, a petition for writ of mandamus might bring the issue before the Court of Appeals to determine if the trial court abused its discretion in issuing the order.").

Petitioner's amici express concern (CoC Br. 17, 22) that an erroneous disclosure order can produce "dramatic spillover effects" or "extreme pressure to settle." Appellate courts are well suited to prevent such consequences through their mandamus authority and have not hesitated to apply the writ to do so. See, *e.g.*, *In re Lott*, 424 F.3d 446 (6th Cir. 2005), cert. denied, 547 U.S. 1092 (2006); *In re Regents of Univ. of Cal.*, 101 F.3d 1386 (Fed. Cir. 1996), cert. denied, 520 U.S. 1193 (1997); *Chase Manhattan Bank, N.A.* v. *Turner & Newall, PLC*, 964 F.2d 159 (2d Cir. 1992); 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3935.3, at 605-606 n.6 (2d ed. 1996 & Supp. 2009) (citing examples). Amici offer no reason why such review would not adequately address the practical concerns that they raise.

Petitioner contends that "even palpably erroneous rulings * * * can be left unremedied via a cursory analysis based on the 'stringent standard' for mandamus." Pet. Br. 38 (quoting *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 289 (1988)). There is no reason, however, to presume that courts will shirk their responsibility to correct significant errors through their mandamus authority. To be sure, mandamus offers little recourse where a claim of privilege lacks merit or serious consequence. But that is the point: to allow immediate appeals as of right in every case in which a claim of attorney-client privilege is asserted and denied would unnecessarily disrupt and undesirably protract litigation throughout the federal courts.

Nor is mandamus the only alternative for an aggrieved party to obtain review of an attorney-client privilege dispute. Where the privilege is of sufficient importance to constitute "a controlling question of law," the immediate appeal of which may "materially advance" the litigation, parties may seek certification for an interlocutory appeal under 28 U.S.C. 1292(b). See *Van Cauwenberghe*, 486 U.S. at 529 ("Our conclusion that the denial of a motion to dismiss on the ground of *forum non conveniens* is not appealable under § 1291 is fortified by the availability of interlocutory review pursuant to 28 U.S.C. § 1292(b)."). And should experience demonstrate that the various alternatives to mitigate harm and secure appellate review in certain circumstances are inadequate, Congress (see, *e.g.*, 28 U.S.C. 1292(a)(1)-(3)) or the Court (pursuant to its rulemaking authority under 28 U.S.C. 1292(e)) could classify attorney-client privilege orders as immediately appealable in appropriate circumstances. See *Cunningham*, 527 U.S. at 210.

### 3. *Certain privileges implicate interests of constitutional significance under the separation of powers and qualify under the collateral order doctrine*

As noted above (pp. 11-12, *supra*), the collateral order doctrine does not categorically exclude all discovery orders irrespective of their nature or the interests that are at stake. This Court has recognized that important governmental interests, principally of constitutional and statutory significance, justify immediate appealability under the collateral order doctrine. See, *e.g.*, *Osborn*, *supra* (Westfall Act certification); *P.R. Aqueduct*, *supra* (Eleventh Amendment immunity); *Helstoski*, *supra* (Speech or Debate Clause immunity). Although the attorney-client privilege does not meet that high bar, privileges such as those protecting Presidential communications and state secrets qualify for such treatment in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions.[5]

The Presidential communications privilege, which draws its authority from the constitutional role of the Executive and "can be viewed as a modern derivative of sovereign immunity," is well established. *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395, 398 n.2 (D.C. Cir. 1984) (citing Raoul Berger & Abe Krash, *Government Immunity from Discovery*, 59 Yale L.J. 1451, 1459 n.46 (1950)). "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," and it derives largely from the "necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States* v. *Nixon*, 418 U.S. 683, 708 (1974). Unlike the attorney-client privilege (see pp. 15-17, *supra*), the Presidential communications privilege is invoked relatively rarely and only after authorization of senior Executive Branch officials.

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[5] Likewise, the D.C. Circuit has held that a Member of Congress may take an immediate appeal of an order rejecting a claim of privilege from the disclosure of information under the Speech or Debate Clause. See *United States* v. *Rayburn House Office Bldg., Room 2113*, 497 F.3d 654, 658 (D.C. Cir. 2007), cert. denied, 128 S. Ct. 1738 (2008).

In *Nixon*, for example, the Court recognized the immediate appealability of a district court order denying the President's assertion of the Presidential communications privilege against a subpoena to produce certain materials before a criminal trial. 418 U.S. at 690-692. Although the Court acknowledged the "strong congressional policy against piecemeal reviews" embodied in 28 U.S.C. 1291, the Court held that the traditional route for generating an appealable order in that context—contempt—was "peculiarly inappropriate" for questions of privilege involving the President of the United States. 418 U.S. at 690-691. Permitting immediate review would avoid an unnecessary "constitutional confrontation between two branches of the Government." *Id*. at 692.

In addition to the Presidential communications privilege, this Court has long recognized a state-secrets privilege. That privilege may be invoked to avoid "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953). The state-secrets privilege, whose origins extend to early Anglo-American law, "performs a function of *constitutional significance*, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities." *El-Masri* v. *United States*, 479 F.3d 296, 303 (4th Cir.), cert. denied, 128 S. Ct. 373 (2007) (emphasis added); cf. *Totten* v. *United States*, 92 U.S. 105, 107 (1876) (noting that in comparison to cases involving common-law privileges—including the attorney-client privilege—"[m]uch greater reason exists for the application of the principle [against maintenance of a suit resulting in disclosure of confidential matters] to cases of contract for secret services with the government"). As a matter of practice, the privilege is invoked by a formal request "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer," underscoring its unique significance to the functions of the Executive Branch and the restraints on its invocation. *Reynolds*, 345 U.S. at 7-8 (footnote omitted).

In addition to their paramount "public importance" and "the need for their prompt resolution," *Nixon*, 418 U.S. at 687, orders denying the applicability of the Presidential communications and state-secrets privileges also satisfy the other traditional elements of the *Cohen* inquiry. First, an order requiring the disclosure of information over the government's assertion of those privileges would conclusively resolve the issue. The Executive cannot be expected to persist in withholding information that a court has ordered to be disclosed; to suggest otherwise would be to invite the "unseemly" inter-branch conflict that this Court declined to let unfold in *Nixon*. *Id.* at 692.

Second, neither the Presidential communications privilege nor state-secrets privilege turns on the merits of the action in which they arise, but rather on the nature of the constitutional prerogatives of the Executive Branch. Accordingly, when compared to the attorney-client privilege (see pp. 17-21 *supra*), the governmental privileges are more readily severable from the merits of the underlying case. For example, the question whether disclosure of a state secret would endanger national security or diplomatic efforts is independent of the merits of the underlying action that seeks the disclosure. If information is properly deemed a state secret, then any assessment of the potential merits of the action or the disclosure's impact on the merits is beside the point—the state secret cannot be divulged regardless. See *Reynolds*, 345 U.S. at 11 (state-secrets privilege cannot be overcome by "even the most compelling necessity"). The Court in *Nixon*, a criminal case where the asserted Presidential communications privilege reflected a "generalized interest in confidentiality," engaged in a more case-specific inquiry, but only *after* finding appellate jurisdiction. 418 U.S. at 711.[6]

Third, an order denying invocation of the Presidential communications or state-secrets privilege is effectively unreviewable after compliance. "Once the information is disclosed, the 'cat is out of the bag' and appellate review is futile." *Al Odah* v. *United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (citation omitted) (order directing disclosure of classified information subject to collateral order appeal). Although a post-judgment appeal can generally undo the litigation-specific effects of an erroneously ordered disclosure (see pp. 21-22, *supra*), the broader harm to the national interest from disclosure of material protected by the Presidential communications or states-secret privilege cannot be undone. Those constitutionally rooted privileges protect information pertaining to top-level communications within the Executive Branch or national security or foreign affairs; once that information is released, a reversal of judgment cannot mitigate the harm to the national interest. The ordered disclosure of communications with the President or his top aides or a state secret, therefore, would much more directly harm the purpose of the corresponding privilege than would disclosure of attorney-client privileged information.

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[6] Although the Court in *Nixon* recognized the Presidential communications privilege to be qualified in the context of that criminal case, the privilege is exceedingly difficult to overcome in the civil context. See *Cheney*, 542 U.S. at 384 ("The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. * * * The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*. As *Nixon* recognized, the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions.'") (quoting *Nixon*, 418 U.S. at 711). The second *Cohen* criterion thus poses even less of an obstacle to immediate appealability of a denial of the Presidential communications privilege in civil litigation.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 2009

# APPENDIX

1. 28 U.S.C. 1291 provides:

**Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

2. Federal Rule of Evidence 502 provides, in pertinent part:

**Attorney-Client Privilege and Work Product; Limitations on Waiver**

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

**(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.**—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

**(b) Inadvertent disclosure.**—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

* * * * *

3. Federal Rule of Civil Procedure 26 provides, in pertinent part:

**Duty to Disclose; General Provisions Governing Discovery**

* * * * *

**(b) Discovery Scope and Limits.**

* * * * *

**(5) *Claiming Privilege or Protecting Trial-Preparation Materials.***

* * * * *

**(B)** *Information produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

# AMICUS
# CURIAE
# BRIEF

128 ⑦

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IN THE

# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,
*Petitioner*,

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NORMAN CARPENTER,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

# BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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# BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

## INTEREST OF *AMICUS CURIAE* [1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the "ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioner. The ABA asks that this Court hold that a party to a federal civil case may take an immediate appeal from a decision of a district court holding that the party has waived the attorney-client privilege and compelling disclosure of otherwise privileged communications.

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

Throughout its history, the ABA has taken a keen interest in attorney-client confidentiality, which is directly affected by determinations of the scope of the attorney-client privilege. The ABA has developed standards governing the preservation of client confidences,[3] and it has participated before this and other courts as *amicus* in cases involving the privilege and the related work-product doctrine.[4] The ABA does so, believing that preservation of client confidences promotes "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

[3] In 1908, the ABA adopted its CANONS OF PROFESSIONAL ETHICS. In 1928, the ABA added Canon 37, which specifically stated, "[i]t is the duty of a lawyer to preserve his client's confidences," and that this duty "outlasts the lawyer's employment." The ABA's MODEL CODE OF PROFESSIONAL RESPONSIBILITY, adopted in 1969, similarly provided that "[a] lawyer shall not knowingly . . . reveal a confidence or secret of a client." Disciplinary Rule 4-101(B)(1). The ABA's current MODEL RULES OF PROFESSIONAL CONDUCT, adopted in 1983 and amended periodically, address the duty to preserve client confidences in Model

In 2004, concerned by the adoption by the Department of Justice and other federal agencies of policies requiring waiver of the attorney-client privilege as a precondition of a determination that a party was cooperating with a government investigation, the ABA established a Task Force on the Attorney-Client Privilege to assess the impact of these policies. After considerable study, the Task Force presented three "bedrock principles" to the ABA's House of Delegates, which were unanimously adopted as ABA policy in August 2005.[5] The first states:

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Rules 1.6 ("Confidentiality of Information") and 1.9 ("Duties to Former Clients").

[4] The ABA's *amicus* briefs on attorney-client privilege and work-product doctrine issues include those filed in *Hickman v. Taylor*, 329 U.S. 495 (1947); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); and *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004).

[5] The ABA's House of Delegates ("HOD"), with more than 500 delegates, is the ABA's policymaking body. Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. Recommendations that are adopted by the HOD become ABA policy. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html.

> RESOLVED, that the American Bar Association supports the preservation of the attorney-client privilege and work-product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice[.]

*ABA 2005 Report with Recommendation #111* (Policy adopted Aug. 2005).[6]

Subsequently, in February 2009, and shortly after this Court granted certiorari in this case, the ABA House of Delegates elaborated on the ABA's commitment to the attorney-client privilege by adopting the following policies, which address precisely the question presented:

> RESOLVED, that the American Bar Association supports the right of participants in federal proceedings to take an immediate appeal from an order that rejects a claim of attorney-client privilege and on that basis requires the production of information or materials for which the privilege has been claimed;
>
> FURTHER RESOLVED, that the American Bar Association believes that the right to pursue such an immediate appeal will help to preserve the attorney-client privilege;

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[6] Available from the ABA.

> FURTHER RESOLVED, that the American Bar Association concludes that [such an order] should be immediately appealable as a collateral final decision under the doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

*ABA 2009 Report with Recommendation #301* (Policy adopted Feb. 2009).[7]

The ABA adopted these policies and submits this *amicus* brief because the ABA believes that denying the opportunity for an immediate appeal from a district court's decision holding that the attorney-client privilege has been waived and compelling production of otherwise privileged communications would significantly impair the attorney-client privilege and the important goals it serves.

## SUMMARY OF ARGUMENT

There should be a right to an immediate appeal under *Cohen* when a court rules that the attorney-client privilege has been waived and compels production of attorney-client communications, because of the importance of the attorney-client privilege and the importance of maintaining the appropriate balance between the public interests embodied in the privilege and in the principle that the public has a "right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50 (1980).

In interpreting the privilege's scope, the courts are guided by "the principles of common law . . . in the light of reason and experience." Fed. R. Evid. 501. The decisions of the lower courts, however, have not always been correct, and "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

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[7] Available from the ABA.

To maintain the appropriate balance between the public interests served by the privilege and the competing interest in access to evidence, a balance that is directly implicated by rulings regarding the scope of the privilege, decisions that the privilege has been waived and compelling production of otherwise privileged information should be included in that "small class" of orders immediately appealable under *Cohen*. The third prong of *Cohen's* test, which the ABA submits is the only prong in dispute in such rulings, is satisfied because "the legal and practical value of [the privilege] would be destroyed if it were not vindicated before trial." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989). Further, the costs that can result when review of an erroneous ruling must await a final judgment (or in many cases not occur at all) make these orders "sufficiently important to overcome the policies militating against interlocutory appeals." *Id.* at 503 (Scalia, J., concurring).

## ARGUMENT

### I. THERE SHOULD BE AN IMMEDIATE APPEAL UNDER *COHEN* WHEN A COURT RULES THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN WAIVED AND COMPELS DISCLOSURE.

In *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318 (1915), this Court stated:

> The desirability of protecting confidential communications between attorney and client as a

> matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

*Id.* at 336, citing *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876); *Blackburn v. Crawfords*, 3 Wall. 175 (1865). *See also Chirac v. Reinicker*, 24 U.S. 280, 294 (1826) (the attorney-client privilege "is indispensable for the purposes of private justice").

Just as well known, however, is the principle that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence." *Trammel*, 445 U.S. at 50 (ellipsis in original; internal quotation marks omitted); *see also Jaffee v. Redmond*, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) ("the particular value the courts are distinctively charged with preserving—justice—is severely harmed by contravention of 'the fundamental principle that the public . . . has a right to every man's evidence'") (quoting *Trammel*, 445 U.S. at 50) (internal quotation marks omitted)).

It is because of the tension between the public interests embodied in the attorney-client privilege and in the "right to every man's evidence," the ABA submits, that the contours of the attorney-client privilege are often unclear. This tension is documented in treatises and scholarly works on the privilege's exceptions, intricacies, and areas of ambiguity.[8]

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[8] See, e.g., EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES (2002).

It is also documented in case law, in which the lower courts have debated the scope of the privilege and, the ABA submits, based on the importance of the privilege, have too frequently been incorrect in determining the appropriate balance between these public interests.

The ABA accordingly asserts that there should be a right to immediate appeal under the collateral order doctrine when a court rules that the attorney-client privilege has been waived and compels production of attorney-client communications. That is, such orders necessarily "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

### A. The Necessity To Maintain the Appropriate Balance Between the Privilege and the "Right to Every Man's Evidence" Is the Result of the Privilege's Ongoing Common Law Development.

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law." *Upjohn*, 449 U.S. at 389, citing 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961).[9] Nevertheless, the appropriate balance between the privilege and the right to "every man's evidence" is continually being debated because a court's

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[9] In fact, the attorney-client privilege "goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned." 8 WIGMORE, EVIDENCE § 2290, at 542.

"interpretation of the privilege's scope is guided by 'the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (ellipses in original) (quoting Fed. R. Evid. 501 and citing *Funk v. United States*, 290 U.S 371 (1933)).

Rule 501 provides authority for the federal courts to pursue an "evolutionary development," *Trammel*, 445 U.S. at 47, of testimonial privileges, including the attorney-client privilege.[10]

In this ongoing "evolutionary development," however, the decisions of the lower courts have not always been correct. For example, the lower courts spent at least twenty years addressing the scope of the attorney-client privilege and the work-product doctrine in the corporate context, to determine when an employee was sufficiently identified with the corporation for the privilege to attach. Over this time, two generally competing tests were used. One was the "control group" test.[11] The other was the "subject matter" test.[12] Still other courts used various "hybrids."[13]

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[10] Rule 501 states: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *See also* S. REP. NO. 93-1277, at 11 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7058 (reflecting congressional intent that questions of privilege, including attorney-client privilege, in federal proceedings be decided under "federally developed common law based on modern reason and experience"). This Court has considered federal and state case law, *see, e.g.*, *Upjohn*, 449 U.S. at 389–93; scholarly commentary, *see, e.g.*, *Trammel*, 445 U.S. at 50 & n.11; and "consensus among the States," *Jaffee*, 518 U.S. at 13 (States' policy decisions, as reflected in court decisions and legislation, bear on questions of federal courts' recognition of new privileges or amendment to existing ones).

This Court has also considered accepted norms of professional conduct, including ABA standards. *See, e.g.*, *Upjohn*, 449 U.S. at 390–91 (to give sound legal advice, lawyer must ascertain factual background and sift through facts), citing ABA MODEL CODE OF PROF'L RESPONSIBILITY, Ethical Consideration 4-1; *Jaffee*, 518 U.S. at 10 & n.9, 13 n.12 (relying in part on professional organizations' ethical standards, in recognizing psychotherapist-patient privilege).

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[11] The "control group" test considered whether an individual was within the group that could take a substantial part in making the decision for which an attorney's advice was sought. A chronological sampling of cases applying this test includes *United States v. Aluminum Co of America*, 193 F. Supp. 251 (N.D.N.Y. 1960); *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub. nom. General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962); *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975); and *SEC v. Canadian Javelin Ltd.*, 451 F. Supp. 594 (D.D.C. 1978).

[12] The "subject matter" test contained several components, including whether the person making the communication was an employee of the corporation, whether the decision was made at the instance of the employee's superior, and whether its subject matter was within the employee's duties. A chronological sampling of cases applying this test includes *Leve v. General Motors Corp.*, 43 F.R.D. 508 (S.D.N.Y. 1967); *Hasso v. Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454 (N.D. Ill. 1974); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977); and *In re Grand Jury Subpoena dated July 13, 1979*, 478 F. Supp. 368 (E.D. Wis. 1979).

[13] *See, e.g., Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc) (five-prong test).

When this Court granted certiorari in *Upjohn*, the lower court had used the "control group" test.[14] This Court concluded:

> The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.

*Upjohn*, 449 U.S. at 392. However, this Court declined to set out the test to be used by the lower courts and, instead, stated: "Any such approach would violate the spirit of Federal Rule of Evidence 501. While such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules." *Id.* at 396–97 (citations omitted).

The wisdom of this approach has been continually reaffirmed as new issues have developed in the legal landscape. However, the ABA submits that this approach also counsels that, for the "small class" of orders in which a court rules that the attorney-client privilege has been waived and compels production, there should be a right to immediate appeal. As this Court stated in *Upjohn*, *id*. at 393:

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[14] The ABA was among the *amici* and urged that the "control group" test "could seriously undermine the vitality of the socially beneficial practice of corporate self-inquiry." Brief of the American Bar Association as *Amicus Curiae*, *Upjohn* (No. 79-886), 1980 WL 339283, at *15–16. The ABA also urged that the Court's decision would "significantly affect the ability of lawyers to provide responsible, effective legal representation and to give informed guidance necessary to ensure compliance with the law." *Id.* at *2. The ABA submits that issues of corporate self-inquiry are similarly important in the present case.

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

### B. The Importance of Maintaining Appropriate Balance Between the Public Interests Counsels that the "Small Class" of Orders Appealable Under *Cohen* Should Include Rulings that the Privilege Has Been Waived and Compelling Production.

The importance of maintaining the appropriate balance between the public interests that are served by the attorney-client privilege and by the "right to every man's evidence" counsels that orders finding waiver of the privilege and compelling production should be included in the "small class" of orders that are immediately appealable under *Cohen*.

These orders, the ABA submits, necessarily satisfy *Cohen*'s three-prong test, in that they will always "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *See also United States v. Philip Morris*, 314 F.3d 612, 620 (D.C. Cir. 2003) (order is appealable under *Cohen* "if it meets the three prong test of conclusiveness, separability and importance, and effective unreviewability").

As to the first and second *Cohen* prongs, the Eleventh Circuit, in the decision now before this Court, stated that the challenged order left "no room for the district court to further consider whether the information at issue is protected," and "we agree that the attorney-client privilege is important and that the district court can resolve [whether the communications must be produced] without deciding the merits of the case." Pet. App. 8a.

Likewise, each of the circuit courts cited by the Eleventh Circuit as having addressed whether such an order was immediately appealable under *Cohen*, *see* Pet. App. 9a–10a, and regardless of their ultimate rulings about the applicability of *Cohen*, concluded that the first and second prongs were met, or their analyses are otherwise distinguishable.[15]

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[15] The cases cited by the Eleventh Circuit in which jurisdiction was found, and accordingly, the first and second *Cohen* prongs were deemed met, are *Philip Morris*, 314 F.3d at 617–21; *Kelly v. Ford Motor Co. (In re Ford Motor Co.)*, 110 F.3d 954, 957–64 (3d Cir. 1997); and *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1087–89 (9th Cir. 2007) (even while noting, for second prong, potential overlap of privilege question and underlying suit). *Cf. F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 459 (1st Cir. 2000) (permitting client that was a party to take immediate appeal from order directed to nonparty law firm, because compliance would "render[] an end-of-case appeal nugatory" and "immediate appeal offers the only vehicle by which [the client] can gain effective review of the [attorney-client] privilege issue"); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159 (2d Cir. 1992) (granting writ of mandamus based on consideration of goals of attorney-client privilege and adverse effects of disclosure of privileged documents to opposing counsel, after brief discussion of *Cohen* that relied on

As for the third prong, however, the Eleventh Circuit concluded that such an order was not effec-

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Second Circuit decisions deeming "discovery orders" not to be appealable; not analyzing whether the three prongs of the collateral-order doctrine would justify a different treatment of orders involving claims of attorney-client privilege).

While the Tenth Circuit in *Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993), found no jurisdiction, that court nevertheless stated that the order "arguably meets the first and second prongs of the [*Cohen*] test." In *Reise v. Board of Regents of University of Wisconsin System*, 957 F.2d 293, 295 (7th Cir. 1992), the Seventh Circuit, in considering an order compelling a mental examination, noted that "even orders to produce information over strong objections based on privilege are not appealable." However, one year after *Reise*, the Seventh Circuit cited *Boughton* with approval in a case involving an informer's privilege. *Simmons v. City of Racine, PFC*, 37 F.3d 325, 327 (7th Cir. 1994), citing *Boughton*, 10 F.3d at 749–50.

In *Texaco Inc. v. Louisiana Land and Exploration Co.*, 995 F.2d 43, 43–44 (5th Cir. 1993), the Fifth Circuit dismissed an interlocutory appeal from an order rejecting a claim of attorney-client privilege, but did so not based on an assessment of whether such an order satisfies the three prongs of *Cohen*, but based on Fifth Circuit precedent that, except where governmental privilege is involved, discovery orders in general are not appealable under Cohen.

Finally, the remaining case cited by the Eleventh Circuit, *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642 (Fed. Cir. 1991), is readily distinguishable, in that it involved the "dilemma" of whether an alleged patent infringer should be "forced to choose between waiving the [attorney-client] privilege in order to protect itself from a willfulness finding . . . and maintaining the privilege." *Id.* at 643–44. The Federal Circuit later overruled all precedent authorizing an adverse inference of willfulness in *Knorr-Bremse Systeme Fuer Nutzfahrzuege GMbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004), explaining: "[T]he inference that withheld opinions are adverse to the client's actions can distort the attorney-client relationship, in derogation of the foundations of that relationship." *Id.* at 1344.

tively unreviewable, stating that if, on appeal from a final judgment, it was determined that the privileged information had been wrongly turned over, "we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information." Pet. App. 8a–9a.

With respect, the ABA asserts that this reasoning is contrary to "the principles of the common law as . . . interpreted by the courts . . . in the light of reason and experience," Rule 501, which have consistently protected against disclosure—and not simply use—of privileged communications. As this Court stated in *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888):

> The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

*See also Swidler & Berlin*, 524 U.S. at 408.

Further, a new trial will not cure the damage caused by an erroneously compelled disclosure. To the contrary, allowing an adversary to see privileged documents that are later held inadmissible at retrial "may alert adversary counsel to evidentiary leads or give insights regarding various claims and defenses. Moreover, attorneys cannot unlearn what has been disclosed to them." *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992). *See also Philip Morris*, 314 F.3d at 619 ("It would be impossible for a court to sort out and redress the harm caused by the incorrect disclosure."); *In re England*, 375 F.3d 1169, 1176 (D.C. Cir. 2004) ("Disclosure followed by appeal after final judgment is obviously not adequate in [privilege] cases—the cat is out of the bag.") (quoting *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (alteration in *England*)).

Finally, an erroneous privilege ruling may ultimately evade appellate review after judgment. The producing party may prevail in the litigation, or the threat of production may induce settlement. Even if not disclosed in the original action, nonparties could demand production of the privileged communications based on rulings for which an appeal was never available.

The Eleventh Circuit's reasoning is not consistent with this Court's determination that an order is effectively unreviewable if it "involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989) (internal quotation marks omitted).

In *Lauro Lines*, this Court concluded that an order concerning a forum selection clause did not involve such a right. *Id.* at 501. *See also id.* at 502–03 (Scalia, J., concurring) (although "the 'right not to be sued elsewhere than in Naples'" is "positively destroyed" if trial occurs in the United States, the right not to be tried in a particular court—even when established by Congress or international treaty—"is not sufficiently important to overcome the policies militating against interlocutory appeals").

Unlike review of a ruling concerning a forum selection clause, when review of an erroneous ruling compelling production of attorney-client communications must occur if at all only after a final judgment, the privilege as to the communications is destroyed. More important, the ABA submits, is the harm to the privilege itself:

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer . . . .

*Fisher v. United States*, 425 U.S. 391, 403 (1976). *See also In re England*, 375 F.3d at 1175–76 ("'important institutional interests' [of encouraging full and frank communication between attorneys and their clients and promoting the broader public interests in the administration of justice embodied in the attorney-client privilege] would be 'eviscerate[d] by an erroneous privilege ruling, underscoring the importance of interlocutory review'") (quoting *Philip Morris*, 314 F.3d at 618) (first alteration added). *Compare Chase Manhattan Bank*, 964 F.2d at 165 (granting writ of mandamus with respect to attorney-client privilege issue because assurance that communications "will not be admissible as evidence at trial . . . will not suffice to ensure free and full communication by clients who do not rate highly a privilege that is operative only at the time of trial").

This is also true where the order concerns an issue of waiver.[16] As the District of Columbia Circuit stated in *Philip Morris*, 314 F.3d at 618:

> A decision defining the contours of a waiver of privilege is no less "important" for *Cohen* purposes than a ruling on the contours of the privilege itself. An erroneous finding of waiver, like an erroneous ruling denying a claim of privilege, eviscerates the same important institutional interests in preserving information, and derivatively, full and frank communication between client and attorney.

When the efficiency interests that underlie finality, including the costs of piecemeal review, are weighed against the costs that can result when review of an erroneous ruling compelling production of privileged communications must await a final judgment, the attorney-client privilege, the ABA submits, is "sufficiently important to overcome the policies militating against interlocutory appeals." *Lauro Lines*, 490 U.S. at 503 (Scalia, J., concurring).

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[16] For a discussion of the growing importance of the issue of waivers, see, *e.g.*, I EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 392 (ABA Sec. of Litigation 5th ed. 2007) ("The expansion of all types of waivers in the last twenty years or so of privilege jurisprudence is stunning in its extent and scope. On occasion one wonders if the multiple types of possible waivers are not about to swallow the privilege whole."). *See also* Fed. R. Evid. 502 ("Attorney-Client Privilege and Work Product; Limitations on Waiver") (limiting when disclosure in court proceeding or to federal office or agency constitutes waiver of privilege, and when such waiver extends to undisclosed communications or information) (effective Sept. 19, 2008).

### C. Orders Ruling that the Privilege Has Been Waived and Compelling Production Should Be Appealable Under *Cohen* Because Questions as to the Appropriate Balance of the Public Interests Must Be Answered Correctly.

District court orders ruling that the attorney-client privilege has been waived and compelling production should be appealable under *Cohen* because questions as to the appropriate balance between the public interests embodied in the attorney-client privilege and the "right to every man's evidence" will continue to be asked and, the ABA submits, must be answered correctly if the privilege is to retain its vitality.

As shown in the discussion of *Upjohn*, *supra*, there have been profound differences of opinion in the lower courts as to the scope of the attorney-client privilege. Differences of opinion are also found in this Court's decisions. For example, in *Swidler & Berlin*, 524 U.S. at 402, this Court considered whether the attorney-client privilege should survive the client's death when, in connection with a criminal investigation of the client, subpoenas were issued to an attorney and his law firm. The lower court had concluded that a balancing test should be used because a risk of posthumous revelation confined to the criminal context would have little to no chilling effect on client communication, and the costs of protecting communications were high. *Id.*[17]

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[17] In its *amicus* brief, the ABA urged that the lower court's decision was a substantial departure from the "principles of common law'" as historically interpreted by the courts, citing Rule 501, and would result in conscientious attorneys advising—regardless of whether death were imminent—that clients should assume their communications would not remain con-

In reversing, this Court concluded that "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application." *Id.* at 409, citing *Upjohn*, 449 U.S. at 393, and *Jaffee*, 518 U.S. at 17–18.

Justice O'Connor, joined by Justices Scalia and Thomas, dissented, asserting that "an invocation of the attorney-client privilege should not go unexamined 'when it is shown that the interests in the administration of justice can only be frustrated by [its] exercise.'" 524 U.S. at 412 (quoting *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693–94 (Pa. Super. 1976) (alteration in *Swidler & Berlin*)).

The ABA submits that *Swidler* illustrates the profound differences of opinion that arise among judges as to the appropriate balance that should be maintained between the attorney-client privilege and the "right to every man's evidence." When an alleged waiver is at issue, the differences of opinion are equally profound. Because "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all," *Upjohn*, 449 U.S. at 393, questions of waiver must be answered correctly if the privilege is to retain its vitality.

Accordingly, the ABA submits that when production of privileged communications is compelled based on a court's order that the privilege has been waived, such orders should fall within that "small class" of

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fidential after death. Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Swidler & Berlin* (No. 97-1192), 1998 WL 208818, at *3.

orders for which there is a right to an appeal under *Cohen*.

## CONCLUSION

For the foregoing reasons, *amicus curiae* the American Bar Association requests that the judgment of the Eleventh Circuit be reversed.

Respectfully submitted,

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May 4, 2009

# AMICUS
# CURIAE
# BRIEF

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## In the
# Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,
*Petitioner,*
v.
NORMAN CARPENTER,
*Respondent.*

*On Writ of Certiorari to the United States*
*Court of Appeals for the Eleventh Circuit*

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. The Chamber is well-situated to brief the Court on the importance of this case to companies embroiled in high-stakes litigation where an order requiring disclosure over a claim of attorney-client privilege — if not reviewable as a collateral order — can have devastating consequences, both in the litigation itself and, more fundamentally, with respect to companies' willingness to speak frankly and fully to their attorneys in the future.

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[1] Pursuant to Rule 37.3(a), copies of the parties' consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## STATEMENT

Under the collateral order doctrine articulated by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a party may take an interlocutory appeal from an order that does not terminate the action but nevertheless "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. *Cohen* permitted an immediate appeal of an order requiring the plaintiff to post security. *Id.* at 547. Since *Cohen*, the Court has applied the collateral order doctrine to permit interlocutory appeals of a variety of orders, from those denying Westfall Act certification and substitution, *Osborn v. Haley*, 549 U.S. 225, 239 (2007), to those denying qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *in forma pauperis* status, *Roberts v. United States Dist. Court*, 339 U.S. 844 (1950). The Court has generally looked to three factors in deciding whether to allow an appeal. The order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978) (citing *Cohen*, 337 U.S. at 546).

Although garden-variety discovery orders are not immediately appealable, the Third, Ninth, and D.C. Circuits have each recognized that orders that vitiate a claim of attorney-client privilege are immediately appealable under *Cohen*. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1087-89 (9th Cir. 2007); *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003); *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997). Recognizing both the weighty interests protected by the attorney-client privilege and the practical ramifications of compelled disclosure, those courts permit interlocutory appeals under *Cohen* of orders requiring disclosure of assertedly attorney-client-privileged materials.

The communications that petitioner seeks to protect from disclosure here — communications relating to an internal investigation — lie at the heart of the attorney-client privilege. Petitioner Mohawk Industries, a producer of consumer and commercial flooring products, hired outside counsel to conduct an internal investigation into petitioner's compliance with immigration law. In the course of that investigation, petitioner's outside counsel interviewed respondent, then an employee of petitioner. No one appears to dispute that the communications between petitioner's counsel and respondent were covered by petitioner's attorney-client privilege. Instead, the issue is waiver. Respondent contends in this suit that counsel pressured him during that interview to recant testimony that purportedly was damaging to petitioner in a different suit (*Williams v. Mohawk Industries, Inc.*, Civ. No. 4:04-cv-0003-HLM, a class action alleging RICO violations), and that petitioner terminated his employment when he refused. Pet. App. 3a. Respondent argued that petitioner waived its attorney-client privilege over these communications by putting outside counsel's actions at issue in the *Williams* case. Pet. App. 4a-6a. The district court agreed and ordered disclosure of the privileged communications. Pet. App. 51a. At the same time, the district court "recognize[d] the seriousness of its finding that Defendant Mohawk has waived the attorney-client privilege," noted that petitioner, "understandably, likely will wish to appeal," and suggested that a collateral order appeal under *Cohen* could be appropriate. Pet. App. 52a. The court accordingly stayed its disclosure order in the event of an appeal. Pet. App. 52a.

The court of appeals disallowed petitioner's appeal on the rationale that the district court's order is not otherwise "effectively unreviewable," *Cohen*, 337 U.S. at 467, and identified two alternative avenues of potential relief. First, the court of appeals suggested that petitioner could obtain effective review by complying with the disclosure order, litigating the case to final judgment, and, if necessary, arguing on appeal that the disclosure order was erroneous and that "privileged information . . . was used to [petitioner's] detriment." Pet. App. 8a. Second, the court suggested that petitioner "*may*" have another avenue of review if it refuses to comply with the order "and contests its validity after being cited for contempt," though the court stated that whether immediate review would be available could depend on the type of sanction imposed for contempt. Pet. App. 13a (emphasis in original). The court also expressed concern that permitting an appeal under *Cohen* could lead to "[a] potentially large volume of appeals," and opined that relegating would-be appellants to petitions for mandamus was "desirable" because of the more stringent standard for mandamus relief. *Id.*

## SUMMARY OF ARGUMENT

Orders requiring disclosure of materials claimed to be attorney-client-privileged should be immediately appealable under the collateral order doctrine derived from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). First, such disclosure orders conclusively determine the disputed question of privilege and thus are "final." Second, the privilege dispute is entirely separate from — *i.e.*, "collateral" to — the merits of respondent's case, and the dispute over whether materials claimed to be protected by the attorney-client privilege must be disclosed is plainly "important."

Indeed, this Court has consistently recognized that the attorney-client privilege is deeply rooted and vital to our legal system. The attorney-client privilege promises clients confidentiality to promote their full and frank communication with their attorneys. When a client communicates in reliance on the privilege, only to see those confidential communications disclosed to an adversary in litigation, the damage to the privilege and its ability to facilitate candid communication is devastating. Before a privilege so central to our adversary system is vitiated, an appellate court should have the opportunity to review whether the disclosure order is proper. The risk of undermining the attorney-client privilege if appeal is not permitted substantially outweighs any concerns about piecemeal litigation or judicial efficiency.

The court below erroneously concluded that the harm caused by compelled disclosure can be effectively remedied on appeal after final judgment. In so concluding, the court took an exceedingly narrow view of what the privilege protects and failed to account for the real-world impact of such an order, especially in the context of mass tort actions or other high-stakes litigation. At the same time, the court vastly overestimated the utility of the "contempt route" to appellate review.

First, the court of appeals failed to appreciate that disclosure of confidential communications to an adversary is at the heart of what the privilege protects. Even if review after final judgment can remedy the direct *use* of privileged communications, it comes far too late to remedy the privilege against *disclosure* that lies at the heart of the privilege. The final-judgment appeal route is even less effective in cases in which there is an asymmetry between the interests of plaintiffs and defendants in non-disclosure. A privileged communication may be relevant not just to a single plaintiff's claim, but to a wide variety of litigation and potential litigation involving the same subject, and once it is disclosed to a single plaintiff, it is effectively disclosed much more broadly. Moreover, because of these practical dynamics, a privilege holder facing a trial-court disclosure order may feel tremendous pressure to settle the case at hand — regardless of its merits or lack thereof — in order to avoid more extensive ripple effects from disclosure. The devastating practical impact of disclosure thus makes it less likely that litigation will continue to final judgment and leaves courts of appeals with no practical ability to mitigate these pressures unless immediate appeal is permitted.

To the extent that the court below relied on the contempt route as an alternative to an immediate appeal, the court erred. This Court has squarely held that an order of civil contempt is not immediately appealable even if the order imposes a fine or imprisonment. *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936). Although a judgment of criminal contempt is appealable, a party in petitioner's position contemplating non-compliance in the hope of obtaining appellate review of a disclosure order could have no basis to predict that non-compliance would lead to criminal contempt as opposed to civil contempt or a non-appealable sanction other than contempt (such as an adverse inference). Moreover, it hardly makes sense to create a system where the only route to the appellate court is to be labeled a criminal contemnor.

In the end, the court below explicitly relied on its concern that allowing appeal would open the floodgates to "[a] potentially large volume of appeals." Pet. App. 13a. The court below cited no evidence in support of this concern, nor have other courts that have invoked the "floodgates" concern. Yet this proposition is readily subject to empirical verification. Ample evidence exists to test the proposition, in the form of the experience of the courts of appeals that do permit immediate appeals of orders compelling disclosure of attorney-client-privileged materials. That body of evidence confirms that even in circuits where the gates are wide open, there has been no flood.

In the 12 years since the Third Circuit decided *Ford Motor Co.*, that court has issued only *six* opinions reviewing similar interlocutory orders compelling disclosure of material claimed to be privileged. Similarly, the D.C. Circuit has considered only *one* such order since it expressly authorized appeal under *Cohen* in 2003, and the Ninth Circuit has considered only *one* since it clearly permitted such appeals in 2007. By contrast, during this same time period, the Third Circuit has considered approximately 78 interlocutory appeals from denials of qualified immunity. Accordingly, whether viewed in absolute or relative terms, the flood feared by the court of appeals turns out to be a trickle. And when the *Cohen* factors are considered without misplaced concern about the volume of such appeals, it is clear that orders compelling disclosure of attorney-client-privileged materials satisfy the requirements of the collateral order doctrine.

## ARGUMENT

### I. AN ORDER COMPELLING DISCLOSURE OF MATERIAL CLAIMED TO BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE SHOULD BE IMMEDIATELY APPEALABLE.

For immediate appeal to lie of an order that does not terminate the litigation, the order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand,* 437 U.S. at 468 (citing *Cohen*, 337 U.S. at 546). The Eleventh Circuit correctly recognized that compulsion of privileged material satisfies the first two prongs of the *Cohen* test. The court nonetheless held an immediate appeal unavailable based on its view that such orders can be reviewed effectively on appeal from a final judgment or possibly after a contempt citation. Pet. App. at 8a, 13a. The analysis of the third *Cohen* factor misconceives the interest protected by the attorney-client privilege and overlooks the practical reasons why review must be immediate in order to be effective.

### A. Orders Compelling Disclosure of Assertedly Privileged Material Conclusively Determine the Disputed Issue of Attorney-Client Privilege.

There is no dispute that the order of the district court satisfies the first prong of the *Cohen* test. Pet. App. at 8a. Orders compelling disclosure of materials claimed to be protected by the attorney-client privilege conclusively resolve the question whether those materials are protected by the privilege and may remain confidential. Nothing in the record suggests that the district court's order was "tentative or subject to revision," *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003), and indeed it is difficult to imagine how an order could go so far as to require the actual disclosure of assertedly privileged material but still be classified as tentative. Nor is there any legal principle that gives such disclosure orders a tentative character. *Compare Coopers & Lybrand*, 437 U.S. at 469 (holding that orders denying class certification are not immediately appealable, in part because such orders are subject to revision under Federal Rules of Civil Procedure). To the contrary, because the disclosure order directly vitiates the confidentiality guarantee at the heart of the privilege, the order's conclusive character is unmistakable. No court of appeals to consider the question has disagreed that such disclosure orders satisfy the first requirement of the *Cohen* test.

### B. Orders Compelling Disclosure of Assertedly Privileged Material Resolve Important Issues that are Separable from the Merits.

The Eleventh Circuit's decision acknowledged that the second *Cohen* factor — that the order is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" — was satisfied here. *Cohen*, 337 U.S. at 546; Pet. App. at 8a ("[W]e agree that the attorney-client privilege is important and that the district court can resolve the privilege issues (*i.e.*, whether Appellant must produce the disputed documents and communications) without deciding the merits of the case.").

1. The court correctly recognized that the question whether assertedly privileged materials must be disclosed is entirely separate from the merits of the underlying action. This is true even where the communications in question may be

highly relevant to the adjudication of the merits of the action, for even then the privilege dispute turns on questions of the law of privilege (be it scope, crime-fraud, or waiver) entirely separate from the merits of the action. *See United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) ("Clearly, the privilege question is separable from the merits of the underlying case."). The "separable" nature of the privilege dispute here is underscored by the fact that it arose as a result of a document filed in a separate lawsuit. Pet. App. at 4a-5a.

2. Although the court below ultimately found the second *Cohen* factor satisfied, it downplayed the critical role the attorney-client privilege plays in the administration of justice and misunderstood the interests it protects. As a result, the court incorrectly balanced the relative importance of vindicating the privilege through interlocutory appeal against the cost of doing so.

a. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This Court has affirmed, time and again, the privilege's significance — indeed, its centrality — to our adversary legal system. Over a century ago, the Court explained that the privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice," and emphasized that such aid by lawyers "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128

U.S. 464, 470 (1888). More recently, the Court reiterated that the "central concern" animating the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *United States v. Zolin*, 491 U.S. 554, 562-63 (1989) (internal quotation omitted). By "promot[ing] trust in the representational relationship," the privilege produces "systemic benefits [that] are commonly understood to outweigh the harm caused by excluding critical evidence." *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). So fundamental is the privilege to our legal system that it even survives the death of the client, *see id.* at 407-09, and protects communications that reveal evidence of past wrongdoing, on the rationale that full and frank disclosure will be discouraged unless the privilege extends to "protect the confidences of wrongdoers." *See Zolin*, 491 U.S. at 562.

Plainly, and in the broadest sense, the proper application of the attorney-client privilege is an "important" issue — not just to an individual client, but to our adversarial system as a whole.

b. Not only is the attorney-client privilege "deeply rooted in public policy," *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994), but a guarantee of confidentiality is at the heart of the privilege. An order compelling disclosure of materials arguably protected by the attorney-client privilege is important, therefore, because it vitiates the protection at the heart of the privilege. That reality is critical for both the second and third prongs of *Cohen*. As this Court underscored in warning against the conclusion "that 'importance' is itself unimportant,"

> the third *Cohen* question, whether a right is "adequately vindicable" or "effectively reviewable," simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.

*Digital Equip. Corp.*, 511 U.S. at 878-79 (internal citations omitted).

Judge Becker, in his characteristically thorough opinion in *Ford Motor Co.*, explained that the interests being balanced may be incommensurable, but that the key is the degree to which the interests that interlocutory appeal would protect are important and the degree to which those interests would be impaired if interlocutory appeal were denied:

> [T]he Court has compared the apple of the desire to avoid piecemeal litigation to the orange of, for example, federalism. * * * What is important for present purposes is that, in a number of the just-cited cases, the Court felt that, because of the imperative of preventing impairment of some institutionally significant status or relationship, the danger of denying justice by reason of delay in appellate adjudication

> outweighed the inefficiencies flowing from interlocutory appeal.

*Ford Motor Co.*, 110 F.3d at 960 (citation omitted).

When viewed through this lens, the case for allowing *Cohen* appeals of orders like that at issue here is magnified. The attorney-client privilege is at its core a privilege against disclosure, so compelled disclosure cuts to the core of the confidentiality interests that the privilege is supposed to protect. Moreover, for the privilege to succeed in its function of encouraging clients to communicate fully and frankly with their attorneys, confidentiality must be guaranteed, not merely likely. This is why the privilege is absolute rather than qualified, for a qualified privilege would not give clients the necessary assurance that their communications will remain confidential. *See Swidler & Berlin*, 524 U.S. at 409; *Upjohn*, 449 U.S. at 393 ("[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all"). Erroneous compelled disclosure of privileged material thus threatens to undermine the societal benefits of the privilege in the most direct and central way, as it fosters the "apprehension of disclosure" (*Hunt*, 128 U.S. at 470) that precludes the frank and full communication between client and attorney that the privilege seeks to promote — not just in that case, but across the board because of the chilling effect of that erroneous disclosure on other clients.

In short, once privileged material is disclosed, the privilege has been defeated. Even assuming that remedies relating to *liability* may exist on appeal from final judgment, *but see infra* at 21-26, a court of appeals after final judgment cannot provide any remedy that can redress or undo a compelled disclosure that has already occurred. Accordingly, the Third Circuit correctly held that the interest "protected by the attorney-client privilege (which would be eviscerated by forced disclosure of privileged material) is sufficiently significant relative to . . . the interests protected by the final judgment rule to satisfy the importance criterion of the second *Cohen* prong." *Ford Motor Co.*, 110 F.3d at 961. In light of "the value of the interests that would be lost through rigorous application of a final judgment requirement" in this context, allowing interlocutory appeal ranks as "important" in the *Cohen* analysis. *Digital Equip. Corp.*, 511 U.S. at 878-79.[2]

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[2] Many of the reasons why review after final judgment fails to protect clients' interests in the confidentiality promised by the attorney-client privilege may apply at least to some extent in the context of other privileges. Nonetheless, given the venerable nature and special importance of the attorney-client privilege, the Court need not decide in this case how the "importance" balancing may turn out in cases involving other privileges. *Cf. Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001) (dismissing appeal of order compelling discovery from state legislators); *Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3d Cir. 2000) (dismissing appeal of order requiring disclosure of sensitive confidential (but not privileged) information regarding settlement amounts).

## C. Orders Compelling Disclosure of Assertedly Privileged Material Are Effectively Unreviewable Unless Immediate Appeal Is Allowed.

### 1. The Harms Caused by Compelled Disclosure of Privileged Communications Cannot Be Effectively Remedied without Immediate Appeal.

The courts that have refused to apply the collateral order doctrine to orders compelling disclosure of potentially attorney-client-privileged materials have concluded that adequate and effective review is possible on appeal from final judgment. Pet. App. at 8a-9a. This conclusion suffers from two serious defects.

First, an appeal after final judgment can do nothing to remedy the disclosure of confidential communications. Even if the consequences of the actual use of privileged materials can be remedied on appeal from final judgment, such an appeal cannot protect the privilege against disclosure, which is the essence of the privilege. Compelled disclosure vitiates the privilege at the moment of disclosure. To protect the privilege and ensure that it can fulfill its important function in our legal system, the law must protect against erroneous compelled disclosure itself. Barring review of disclosure orders until after disclosure, use, and final judgment have occurred and providing review only of liability implications of such orders thus misses the point of the privilege.

Second, the courts' analysis of the ability of a final judgment appeal to provide an effective remedy not only misconceives the nature of the privilege, but also fails to appreciate the reality of the litigation dynamic. In the real world of mass-tort and other high-stakes litigation, there is often a fundamental asymmetry between the plaintiff's stake in the particular case in which the privilege is in dispute and the defendant's exposure in multiple cases to which the information may be relevant. In such situations, disclosure orders frequently have dramatic spillover effects beyond the specific case in which the disclosure order is entered. Winning reversal of the disclosure order after final judgment would be an empty victory where the disclosure already had caused adverse effects beyond the specific case at hand. Indeed, in practice, final judgment review will come not merely too late, but not at all: a disclosure order in one of a large number of related cases may force a litigant to settle to avoid disclosure, regardless of the merits of the privilege claim or the underlying action, to avoid use of the disclosed material against it by countless other parties.

a. The court below based its conclusion that final-judgment review is adequate on the notion that if it were to hold that "privileged information was wrongly turned over and was used to the detriment of the party asserting the privilege, we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information . . . ." Pet. App. 8a. Other courts reaching the same conclusion as the court below likewise have focused on the ability of a final-judgment appeal to reverse a liability judgment based at least in part on the use of improperly-disclosed privileged materials. *See, e.g., Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993) ("The practical consequences of the district court's decision on the controversy between the parties can be effectively reviewed on direct appeal following a judgment on the merits.").

That conclusion would be relevant if the attorney-client privilege were primarily a "use privilege," precluding only the use of attorney-client communications as evidence. But the attorney-client privilege is primarily a privilege guaranteeing confidentiality and protecting against disclosure. And post-final-judgment review does nothing to remedy the breach of the privilege against disclosure. "[O]nce putatively privileged material is disclosed, the very right sought to be protected has been destroyed." *Ford Motor Co.*, 110 F.3d at 963 (internal quotation omitted); *see also Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 164 (2d Cir. 1992) ("The attorney-client privilege prohibits disclosure to adversaries as well as the use of confidential communications as evidence at trial.").[3]

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[3] Although the Fifth Circuit has since adopted the same position as the court below, that court long ago correctly recognized that disclosure itself causes irreversible injury where the claimed right is a right against disclosure. In *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979), the court held that *Cohen* permitted immediate appeal of an order requiring anonymous plaintiffs to reveal their identities: "[B]ecause the identities of the

The Seventh Circuit has reasoned that *Cohen* appeals of disclosure orders are improper because even though "[t]he travail and expense of discovery and trial cannot be reversed at the end of the case . . . this has never been thought sufficient to allow pretrial appeals." *Reise v. Board of Regents of University of Wisconsin Sys.*, 957 F.2d 293, 295 (7th Cir. 1992). But that rationale fails to appreciate what the attorney-client privilege protects. The harm inflicted on the attorney-client privilege by the erroneous disclosure of privileged material is not simply, or even principally, the "travail and expense of discovery." Although such harms can be substantial, incurring unrecoverable discovery costs is the ordinary and inevitable consequence of the "American rule" for attorney's fees. A party that

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Association's members, once revealed, could not again be concealed, review following a decision on the merits would come too late to remedy any injury caused by the order to disclose the membership information." *Id.* at 712. Regardless of whether the claimed right to proceed anonymously is sufficiently important, compared to the attorney-client privilege, to justify immediate appeal in that specific context, the Fifth Circuit's decision illustrates the inadequacy of final-judgment review to vindicate a right against disclosure. In *Texaco Inc. v. Louisiana Land and Exploration Co.*, 995 F.2d 43, 44 (1993), the Fifth Circuit found that its precedents were inconsistent and chose to follow *Honig v. E.I. DuPont de Nemours & Co.*, 404 F.2d 410 (5th Cir. 1968) (per curiam), and to reject *SMU Ass'n of Women Law Students*, despite the fact that *Honig* was a one-paragraph opinion that did not involve an order vitiating a privilege and merely stated the general rule that discovery orders are not immediately appealable.

incurs discovery costs before prevailing later in the litigation does not suffer the "irretrievabl[e] los[s]" of an important right. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 525 (1988); *cf. Digital Equip. Corp.*, 511 U.S. at 882 (distinguishing "an unusual interest in preventing disclosure of particular information" from "the generic desire to triumph early" in litigation). Instead of the "travail and expense" noted by the Seventh Circuit, the harm caused by an order erroneously compelling disclosure of privileged material is the loss of confidentiality in that material, as well as the broader apprehension of disclosure and resulting loss of confidence that clients' communications with their attorneys will remain confidential. And without that assurance, the privilege cannot succeed in its core function of encouraging full and frank communication. *See Philip Morris*, 314 F.3d at 618 ("Only by ensuring that privileged information is never disclosed will [the broader public interests in the observance of law and administration of justice] be advanced."). The "limited assurance" that material later held to be privileged ultimately will not be admissible "will not suffice to ensure free and full communication by clients who do not rate highly a privilege that is operative only at the time of trial." *Chase Manhattan Bank*, 964 F.2d at 165. If that were a sufficient assurance, the privilege would provide only a protection against use. The privilege is a much more robust protection against disclosure precisely because that level of assurance is necessary to foster the necessary candor between client and lawyer.[4]

b. For the reasons just discussed, the court below simply failed to appreciate the nature of the privilege in concluding that a final-judgment appeal could provide an effective remedy. A final-judgment appeal cannot vindicate the privilege holder's interest in confidentiality. But the court also overstated the extent to which final-judgment review is adequate even to vindicate a privilege holder's secondary interest in avoiding liability based on the use of privileged communications. The court's simplistic conclusion that a court of appeals can set aside a liability judgment if the judgment flowed from an erroneous disclosure order assumes that the privilege holder will comply with the disclosure order, litigate to final judgment, be held liable, and then appeal, and then further assumes that the court of appeals can provide full redress by setting aside the judgment in that particular case. These assumptions are highly doubtful because they overlook the real-world importance of compelled disclosure of assertedly privileged material.

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[4] In *Chase Manhattan Bank*, the district court had ordered disclosure to opposing counsel for an attorney's-eyes-only review before adjudicating the privilege claim. Even though the court intended to adjudicate any privilege dispute that remained after this procedure, and to order return of any material held to be privileged before proceeding to trial, the Second Circuit recognized that even the temporary disclosure of privileged material causes "a pertinent aspect of confidentiality [to be] lost." 964 F.2d at 165. That court's admonition that excluding previously-disclosed privileged material at trial is insufficient to preserve clients' faith in the privilege applies *a fortiori* to the present case, because clients "rate" even less "highly" a privilege that is operative only at the time of *retrial*, after the client has persevered through final judgment and suffered an adverse liability finding. Indeed, this Court has cautioned that freely allowing disclosure even to the court alone *in camera* "would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *Zolin*, 499 U.S. at 571 (permitting *in camera* review to decide applicability of crime-fraud exception only upon substantial threshold showing).

First, there are powerful practical reasons why the case in which disclosure is ordered is unlikely to make it to the court of appeals after final judgment. A litigant facing a disclosure order often will feel extreme pressure to settle rather than comply with the order, especially where there is an asymmetry between the plaintiff's interest in the particular case and the defendant's broader interest in other related litigation in which the disputed information may be relevant. As the present case illustrates, these privilege decisions do not occur in a vacuum. Rather, the privilege holder may be embroiled in extensive and high-stakes litigation involving other parties (such as the *Williams* class action against petitioner), and disclosure in one case may have dramatic spillover effects in other cases. To contain the damage caused by the disclosure order to the case at hand, the privilege holder may have little choice but to preempt the disclosure order by settling that case, regardless of its merits.

Second, and relatedly, even if the privilege holder resists the pressure to settle and takes a final-judgment appeal, the court of appeals can provide redress only in that particular case and is powerless to remedy the ripple effects that already have been suffered in other cases not before it. *See, e.g., In re Qwest Communications, Int'l*, 450 F.3d 1179, 183 (10th Cir. 2006) (recognizing in mandamus context that "given the litigation pending outside this court's jurisdiction, normal appellate review could not return the parties to the status quo . . . [and] review after production would essentially be meaningless"). In short, relegating privilege holders to final-judgment appeals would mean, in practice, that most disclosure orders would go unreviewed and that adequate relief often would not be available even in the few cases that are reviewed.

These concerns are exemplified by the context of the cases in which the Third, Ninth, and D.C. Circuits have held that *Cohen* appeals are permitted. Each case involved high-stakes litigation in which the privilege holder could not have secured adequate relief if review had been postponed until after final judgment.

In *Ford Motor Co.*, the plaintiff who obtained the disclosure order was but one claimant alleging that Ford was liable for a rollover fatality purportedly caused by safety issues associated with Ford's Bronco II. *Ford Motor Co.*, 110 F.3d at 956. More than 700,000 claimants were part of class-action and multi-district litigation involving similar claims. *See In re Ford Motor Co. Bronco II Prods. Liability Litig.*, No. 94-MD-991 (E.D. La.). The assertedly privileged material at issue in the Third Circuit appeal was "two groups [of documents] — minutes of a meeting attended by top-level executives of Ford Motor Company regarding the Bronco II, and agendas for a discussion of the technical characteristics of the Bronco II." *Ford Motor Co.*, 110 F.3d at 956. These documents related to legal and business decisions concerning the Bronco II's safety and reflected the fact that Ford "had concerns about the Bronco II" in the early stages of its development. *Id.* at 966. In deciding how to proceed in the particular case before the Third Circuit, Ford thus had to take account the enormous mass of related litigation in which the disputed material was relevant. If immediate review had not been permitted, it blinks reality to imagine that Ford would have complied with the disclosure order and litigated that case to final judgment in order to preserve its privilege appeal, rather than settle — at a substantial premium having nothing to do with the underlying merits of the suit — in order to avoid the exponentially greater harm that would be caused by disclosure. It is even harder to imagine how, if Ford somehow had pursued its privilege claim after disclosure and final judgment, the court of appeals could have done anything to provide redress remotely adequate to account for the damage caused in 700,000 related cases.

The *Philip Morris* privilege dispute involved similar dynamics. In that case, perhaps the "the largest piece of civil litigation ever brought," *United States v. Philip Morris USA, Inc.*, No. 1:99-cv-02496-GK (D.D.C.), slip op. at 15 (Sept. 8, 2006), the D.C. Circuit stayed an order compelling disclosure of the "Foyle Memorandum," a document that allegedly showed an intent to hide relevant documents from the public. *See* 314 F.3d at 615-16. The stakes were extremely high in the *Philip Morris* case itself, but the effect of the disclosure order would have been magnified greatly by the existence of countless other tobacco cases in courts around the nation involving similar issues and billions in damage claims.

In the *Napster* litigation as well, the privilege dispute arose in the context of quintessential bet-the-company litigation involving multi-district copyright infringement claims that threatened to (and did) shut down Napster, as well as fraud claims against Bertelsmann, Napster's lender. *See* 479 F.3d at 1083. If the assertedly privileged material had been disclosed, it likely would have had dramatic consequences both with respect to Bertelsmann, the privilege holder, and to Napster.

As these cases illustrate, the ripple effects of compelled disclosure of assertedly privileged information often will make appellate review after final judgment a wholly unrealistic option. For these litigants, it is an immediate appeal or nothing. Even putting aside the fundamental point that the privilege is a privilege against disclosure and as such cannot be vindicated even in principle by post-disclosure review, these practical considerations demonstrate that a final-judgment appeal is not adequate even to vindicate the interest in avoiding liability flowing from an erroneous disclosure order.[5]

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[5] Post-disclosure appeal is not adequate even in the narrower sense of ensuring that the privilege holder is not subjected to liability in the case at hand as a consequence of an erroneous disclosure order. Although the court of appeals can set aside a liability judgment and forbid use of the privileged material on remand, the court of appeals cannot erase the erroneously-disclosed material from the minds of the parties or their

Because both "the legal and practical value [of the attorney-client privilege] would be destroyed if it were not vindicated before trial," interlocutory appeal should be permitted. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989) (internal quotation omitted).

### 2. Appeal of a Contempt Order is Not a Viable, Let Alone An Effective, Form of Review.

The Eleventh Circuit also suggested that the collateral order doctrine did not apply because petitioner "*may*" have had an effective avenue of review if it "refuse[d] to comply with the order and contest[ed] its validity after being cited for contempt." Pet. App. 13a. But the "contempt route" fares no better than the final-judgment appeal route as a means for effective appellate review of a disclosure order.

In reality, the supposed contempt alternative is no alternative at all: it has been effectively foreclosed by this Court's decisions. "The rule is

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counsel. *See, e.g.*, *Ford Motor Co.*, 110 F.3d at 963 ("'[A]ttorneys cannot unlearn what has been disclosed to them in discovery'; they are likely to use such material for evidentiary leads, strategy decisions, or the like.") (quoting *Chase Manhattan Bank*, 964 F.2d at 165); *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005). Moreover, evaluating whether an erroneous disclosure order amounted to prejudicial error would be no simple matter. Even a court that attempted to bar any use of the privileged information, *see* Pet. App. 8a-9a, likely would find it "impossible . . . to sort out and redress the harm caused by the incorrect disclosure." *Philip Morris*, 314 F.3d at 619.

settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt." *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) (citing *Doyle v. London Guar. & Accident Co., Ltd.*, 204 U.S. 599 (1907); *In re Christensen Eng'g Co.*, 194 U.S. 458 (1904); *Hayes v. Fischer*, 102 U.S. 121 (1880); *Worden v. Searls*, 121 U.S. 14 (1887)); *see also Philip Morris*, 314 F.3d at 620 ("In this circuit, however, it is settled that a civil contempt citation is not appealable as a collateral order."); *Powers v. Chicago Transit Authority*, 846 F.2d 1139, 1142 (7th Cir. 1988) ("So long as *Fox* and *Doyle* define the meaning of a 'final decision' under § 1291, an order holding a party in civil contempt for failure to reveal information to the district court is not appealable.").

The Eleventh Circuit's tentative suggestion that a party "*may*" have a right to appeal a certain class of contempt orders that impose "a fine or penalty . . . that may not be avoided by some form of compliance" — *i.e.*, a "*noncontingent*" sanction — is inconsistent with *Fox*. Pet. App. at 13a (quotation omitted). The *Fox* Court held that the would-be appellant could not challenge even his non-contingent $10,000 contempt sanction by way of direct appeal. *Fox*, 299 U.S. at 108. So long as *Fox* and *Doyle* remain good law — and no one suggests that this case presents any occasion to re-examine them[6] — it is settled that the only form of contempt giving rise to an immediate appeal is a punishment for *criminal* contempt. Thus, the Eleventh Circuit's potential alternative avenue of review is illusory.

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[6] This Court has recognized exceptions to the rule of *Fox* and *Doyle* in certain specific contexts, but the Court has never

Needless to say, the possibility of appeal of a criminal contempt finding is not an effective alternative route to appellate review. A party in petitioner's position that wishes to obtain timely appellate review of a disclosure order cannot know whether its non-compliance will lead to criminal contempt or to a non-appealable sanction such as civil contempt. Indeed, in the context of an order compelling a party with at least a colorable legal basis to resist to take some action, civil rather than criminal contempt would appear to be the appropriate sanction. *See, e.g., U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988) ("If either of the two orders appears efficacious, the better practice is to enter civil contempt to persuade a party to comply, reserving the more drastic, punitive sanction only if

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called their basic holding into question. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 7 (1941) (accepting appeal from civil commitment order without expressly addressing appellate jurisdiction); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) (permitting appeal of contempt order against non-party grand jury subpoena recipient). *But cf. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (stating in dictum, citing *Cobbledick*, that "in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling").

disobedience continues.") (citation omitted). And non-contempt sanctions are within the district court's discretion as well "and are therefore not reliable avenues to appeal." *Philip Morris*, 314 F.3d at 620. In addition, it would be more than passing strange to create a system where a litigant has an incentive to seek out criminal contempt as the only route to appellate review.

For these reasons, the court below erred in relying on the possibility that contempt could be a substitute for appeal under *Cohen*. Other courts disallowing immediate appeals have made similar errors. *See Philip Morris*, 314 F.3d at 620 (stating that "[a]t least some of the holdings [rejecting appeal under *Cohen*] are based in part upon the assumption that disobedience may lead to a contempt citation that would itself be an appealable order"). When this erroneous reliance on contempt is laid bare, it is even more obvious that there is no adequate alternative to permitting immediate appeal of orders compelling disclosure of assertedly privileged material.

## II. RECOGNIZING THE RIGHT TO APPEAL ORDERS COMPELLING DISCLOSURE OF ASSERTEDLY PRIVILEGED MATERIAL WILL NOT LEAD TO A FLOOD OF LITIGATION.

In refusing to allow immediate appeal of disclosure orders, the court below and other courts have expressed fears about opening the proverbial floodgates and engendering substantial appellate litigation over countless discovery orders. Pet. App. at 13a ("A potentially large volume of appeals may arise out of such discovery orders, and, thus there are powerful prudential reasons to avoid commonplace interlocutory appeals."); *see also Reise*, 957 F.2d at 295. The court below did not substantiate this concern, even though it is readily subject to empirical verification or disproof. The Third, Ninth, and D.C. Circuits each permit this class of interlocutory appeals, and so each presents a ready context in which to test the floodgates concern. Their experience clearly demonstrates that there is no need to fear a flood of new litigation.

As measured by the available published and unpublished decisions of the Third, Ninth, and D.C. Circuits, the floodgates concern appears to be entirely unfounded.[7] The results are striking: even in the circuits where the gates have been open, there has been only a trickle of interlocutory appeals.

The first of the courts of appeals to clearly permit direct appeals of orders vitiating the attorney-client privilege was the Third Circuit. In the 12 years since issuing its opinion in *Ford Motor Co.* in May

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[7] To conduct this research, counsel searched the relevant Westlaw and LexisNexis databases using the search terms "interlocutory appeal" OR "collateral order" (appearing anywhere within the opinion), with a date range of the dates of decision in *Ford Motor Co.*, *Philip Morris*, and *Napster*, respectively, to the present. Counsel also limited the search to those decisions that used the word "privilege." Additionally, counsel searched the databases for these three circuits for decisions citing *Ford Motor Co.*, *Philip Morris*, and *Napster*, respectively. Counsel then reviewed the search results to determine whether the decision involved an interlocutory appeal of an attorney-client privilege determination.

1997, that court has issued only *six* decisions where a party sought immediate review of such an order. *See In re Teleglobe Commc'n Corp.*, 493 F.3d 345 (3d Cir. 2007); *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007); *In re Cendant Corp. Securities Litig.*, 343 F.3d 658 F.3d 658 (3d Cir. 2003) (work product); *Montgomery County v. Microvote Corp.*, 175 F.3d 296 (3d Cir. 1999); *Newman v. General Motors Corp.*, No. 06-2473, 228 Fed. Appx. 245 (3d Cir. June 20, 2007); *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C.*, No. 01-4517, 57 Fed. Appx. 58 (3d Cir. Jan. 27, 2003).[8]

By way of comparison, during this same time period, the Third Circuit has issued approximately

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[8] Additionally, the Third Circuit has dismissed appeals under the collateral order doctrine in six cases where a party sought review of an order involving a different type of privilege. *See In re Carco Elec.*, 536 F.3d 211 (3d Cir. 2008) (dismissing appeal of order granting trade secrets protection); *In re Flat Glass Antitrust Litig.*, 288 F.3d 83 (3d Cir. 2002) (dismissing appeal of order compelling production of attorney work-product documents from non-party where non-party had not been held in contempt); *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001) (dismissing appeal of order compelling discovery from state legislators); *Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3d Cir. 2000) (dismissing appeal of order requiring disclosure of sensitive confidential (but not privileged) information regarding settlement amounts); *Wexco Inds. v. ADM21 Co. LTD*, Nos. 05-4853, 05-5174, 260 Fed. Appx. 450, 450 (3d Cir. Jan. 9, 2008) (dismissing appeal because it did not "immediately implicate the disclosure of any documents purportedly protected by the attorney-client privilege"); *In re Horn*, No. 04-9017, 185 Fed. Appx. 199 (3d Cir. June 23, 2006) (dismissing appeal of order granting access to prosecutor's jury selection notes in habeas corpus proceeding).

*78* written decisions in interlocutory appeals from the denial of qualified or absolute immunity under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[9] This represents a thirteen-to-one ratio between the numerosity of interlocutory appeals in these different procedural contexts. Thus whether measured in absolute (six) or relative (1/13th) terms, the floodgate problem has been non-existent in the Third Circuit.

The D.C. Circuit has permitted this class of direct appeals since at least January 2003, when it issued an emergency stay in *Philip Morris*. Notably, the D.C. Circuit's decision in *Philip Morris* is broader than the decision in either *Napster* or *Ford Motor* because the court held that any order which has the *effect* of compelling disclosure of attorney-client-privileged materials is directly appealable. *Philip Morris*, 314 F.3d at 618 ("A decision defining the contours of a waiver of privilege is no less 'important' for *Cohen* purposes than a ruling on the contours of the privilege itself.").[10] Nevertheless, since the

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[9] To determine the prevalence of interlocutory appeals under *Mitchell* in the time since the Third Circuit decided *Ford Motor Co.*, counsel searched the Westlaw and LexisNexis databases of that court's published and unpublished decisions since May 2, 1997 for the terms "qualified immunity" or "*Mitchell v. Forsyth.*" This search netted 327 results on Westlaw and 329 results on LexisNexis. Counsel then reviewed the search results to determine whether the decision involved an appeal of the denial of a motion to dismiss or for summary judgment based on immunity.

[10] More specifically, the D.C. Circuit's decision considered an order compelling disclosure of privileged materials as a result of alleged discovery abuse — failure to disclose or log a

*Philip Morris* decision in 2003, the D.C. Circuit has decided only *one* other appeal involving a challenge to an order compelling disclosure of attorney-client privileged materials — and that appeal arose in the same case and addressed the same Foyle Memorandum. *See United States v. British American Tobacco (Investments), LTD.*, 387 F.3d 884 (D.C. Cir. 2004).[11]

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presumptively privileged communication — and thus implicates a broader class of orders than directly at issue here. *See Philip Morris*, 314 F.3d at 618. The Court need not decide in the present case whether orders compelling disclosure of privileged material as a sanction for discovery misconduct should be treated the same as orders compelling disclosure of assertedly privileged material based on a substantive, non-discretionary conclusion about the merits of a privilege claim.

[11] The D.C. Circuit has also issued five other decisions that could be loosely described as pertaining to compelled disclosure of privileged materials generally, but not the attorney-client privilege specifically. *See United States v. Rayburn House Office Building, Room 2113*, 497 F.3d 654 (D.C. Cir. 2007) (considering appeal of congressman's motion for return of seized privileged legislative materials); *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007) (considering denial of plaintiff's motion to quash subpoenas for his psychoanalyst's records); *In re Sealed Case (Medical Records)*, 381 F.3d 1205 (D.C. Cir. 2004) (considering appeal of non-party whose medical records were compelled in litigation); *In re England*, 375 F.3d 1169 (D.C. Cir. 2004) (considering direct appeal of order compelling disclosure of military selection and promotion board); *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003) (dismissing appeal under collateral order doctrine where appellant asserted that separation of powers excused him from having to assert executive privilege to avoid production of documents), *rev'd sub nom. Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367 (2004). As observed in footnote 2, *supra*, the Court need not consider

The Ninth Circuit has permitted this class of direct appeals since at least March 2007, when the court decided *Napster*.[12] In the two years since the *Napster* decision, the court has issued only *one* decision reviewing an order related to a claim of attorney-client privilege, *Truckstop.net LLC v. Sprint Corp.*, 547 F.3d 1065, 1068 (2008).[13]

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whether other privileges should be treated identically to the attorney-client privilege for purposes of allowing immediate appeal.

[12] Immediate appeal of this class of orders was arguably available under Ninth Circuit caselaw even before *Napster*, but the availability of such review was not crystal clear. *See United States v. Griffin*, 440 F.3d 1138, 1142 (9th Cir. 2006) (permitting appeal of order vitiating marital privilege); *Agster*, 422 F.3d at 838 (considering appeal of order requiring disclosure of materials allegedly protected by peer-review privilege, but limiting conclusion that appeal is proper to "the specific circumstances of this case"); *Bittaker v. Woodford*, 331 F.3d 715, 717-18 (9th Cir. 2003) (en banc) (considering appeal of protective order sought to protect disclosure of privileged materials in a habeas corpus ineffective assistance of counsel challenge).

[13] *Truckstop.net* underscores that, to be effective, appellate review must occur before privileged material is disclosed. In that case, a party inadvertently disclosed privileged material and sought to appeal the district court's subsequent decision concerning how much of the disclosed material could be retained by the opposing party. Precisely because it was too late, post-disclosure, to provide an effective remedy for the loss of the privilege, the Ninth Circuit dismissed the appeal. *See* 547 F.3d at 1068 ("irreparable harm from the disclosure of the allegedly privileged material has already taken place when the material has been inadvertently disclosed").

In short, in the 12 years since the Third Circuit first applied the collateral order doctrine to this class of orders, there have been a total of *eight* decisions on direct appeals of orders compelling disclosure of assertedly attorney-client privileged materials. Thus, while the court below feared a flood, empirical research shows barely a trickle. And with concerns about an inundation of interlocutory appeals properly set aside, it is clear that the *Cohen* factors point uniformly to allowing interlocutory appeal.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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# AMICUS
# CURIAE
# BRIEF

No. 08-678

JUL 13 [illegible]

IN THE

# Supreme Court of the United States

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MOHAWK INDUSTRIES, INC.,

*Petitioner*,

—v.—

NORMAN CARPENTER,

*Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF OF FORMER ARTICLE III JUDGES AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* listed in Appendix A are former Article III judges and law professors who teach and write about evidentiary privileges and/or trial and appellate procedure within the federal system. *Amici* come together in this case because of their shared recognition of the important role played by the final judgment rule in promoting efficient litigation, preserving scarce judicial resources, and protecting the proper institutional prerogatives of the Article III district courts and courts of appeals. *Amici* all agree that, for the reasons set forth below, extending the collateral order doctrine to this case would be both unnecessary and unwise.

## SUMMARY OF ARGUMENT

By any standard, the job of the federal circuit judge is more difficult today than it was 5, 10, or 25 years ago. Data maintained by the Administrative Office of the U.S. Courts demonstrate the increasing numerical caseload of the thirteen Article III courts of appeals over these periods, even as the number of congressionally authorized judgeships has remained almost static, and the real-dollar value of judicial budgets—including salaries—has decreased. All the while, the average time-to-decision in the courts of appeals has increased, underscoring the extent to which these changes have had a quantifiable effect.

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. *Amici* wish to thank Meghann Ostertag, Notre Dame Law School Class of 2009, for her research assistance.

But the data tell only part of the story. The same period has also witnessed a subtle but profound change in the substantive nature of some classes of appellate review, especially as most of the circuit courts have come to serve as courts of first impression in immigration appeals—a body of cases comprising as much as 40% of some circuits' annual dockets. It is impossible to quantify the uptick in difficulty of the typical appeal, but anecdotal evidence suggests that this concern is more than just a short-term aberration.

The pressures created by both the size and nature of contemporary appellate dockets are only heightened to the extent that the courts of appeals generally lack control over their jurisdiction, and are thus in danger of being overwhelmed. As a result, and as commentators and judges alike have documented, circuit courts have increasingly resorted to other, less obvious means for dealing with their overcrowded dockets, including an increase in the number of cases decided without oral argument, an increasing resort to staff attorneys and other court personnel for assistance in decisionmaking, and an increase in the number of unpublished dispositions—even in cases that appear to be creating new law.

The final judgment rule codified in 28 U.S.C. § 1291 has been an important bulwark against these added pressures. More than just a tool for increasing the efficiency of litigation, the final judgment rule serves as an important statutory barrier to what might otherwise be a deluge of interlocutory appeals—appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt most civil litigation toward the party with greater financial resources.

Of course, both Congress and this Court have recognized that there will be circumstances in which an appeal after final judgment is inadequate to protect the interests of the aggrieved party, and where the case for interlocutory appeal is stronger than that for denying it. But this is not such a case. Assuming the unavailability of other means of obtaining appellate review, data suggest that there are several hundred district court decisions each year rejecting the application of the attorney-client privilege that would become immediately appealable if Petitioner's argument were adopted.

Moreover, there are virtually no principled bases of distinction between the district court decision in this case and thousands of district court decisions every year in which the applicability of evidentiary privileges is rejected. Thus, application of the collateral order doctrine to this case risks converting the exception into the rule, thereby dramatically increasing the workload of already overburdened appellate courts while fundamentally inverting the institutional role of the trial and appellate courts in the federal judicial system. The decision below should be affirmed.

## ARGUMENT

### I. THE BURDEN ON THE ARTICLE III COURTS OF APPEALS HAS INCREASED SIGNIFICANTLY IN RECENT YEARS

In a 1976 address to the American Bar Association, then-Justice Rehnquist reflected on the dangers that increasing workloads posed for appellate judges:

> The person who actually decides an appeal is an appellate judge—the person who supervises the processing of such appeals to decision, though he be called an appellate judge, is really more of an administrator. Instead of personally delving into and casting a vote on, say, ten cases, he takes part in supervising law clerks who delve into twenty or thirty cases, he approves what the law clerks have done in half or two-thirds of that number, and personally delves into and decides the remainder.
>
> So long as the clerks and judges are capable, and they generally are, there is no denial of justice in this system. But the appellate judge who is one of its supervisors plays a different role than the appellate judge of a generation ago.
>
> The great hallmark of judges, to my mind, has always been the idea that whatever goes out over a judge's signature, while not necessarily composed in its entirety by him, has at least been fully considered and understood by him. Any significant increase in this trend of converting judges into administrators would jeopardize that principle of judging.

Justice William H. Rehnquist, Remarks at the Annual Dinner of the American Bar Association (Aug. 9, 1976), *quoted in* Carolyn Dineen King, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 958 (1991). *See generally* PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL (1976) (documenting the changing nature of the contemporaneous appellate workload and its impact). Justice Rehnquist's warning, though, has gone unheeded. Instead, by any standard, the job of the federal circuit judge far more closely resembles that of an administrator today than it did in 1976 (or even 1986 or 1996).

### a. The Workload of Article III Appellate Judges Has Increased Significantly in the Past Decade

According to the Administrative Office of the U.S. Courts, filings in the 12 regional U.S. courts of appeals increased 11.7% between FY1999 and FY2008. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 13, *available at* http://www.uscourts.gov/judbus2008/JudicialBusinespdfversion.pdf [hereinafter 2008 JUDICIAL BUSINESS].[2] Much of this upsurge included a 27.2% jump between FY2000 and FY2005, even though district court filings during the same period decreased by 3.4%. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2005 ANNUAL REPORT OF THE DIRECTOR 13–16, *available at* http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf [hereinafter 2005 JUDICIAL BUSINESS]; *see also* Richard A. Posner, ***Demand and Supply Trends in Federal and State Courts Over the Last Half Century***, 8 J. APP. PRAC. & PROCESS 133, 133–34 (2006) (noting the discrepancy between the increasing size of appellate dockets and the static nature of trial-court dockets). *See generally* THOMAS E. BAKER, FED. JUDICIAL CTR., A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS § 1.04, at 8–12 (2d ed. 2009).

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[2] The Administrative Office maintains filing data by fiscal year, rather than calendar year.

As the absolute volume of appeals per year has increased, the number of authorized judgeships has remained virtually fixed since 1990 at 167. *See id.* at 13.[3] As a result, there are seven extant "judicial emergencies" in the courts of appeals,[4] and there has also been a marked increase in inter-circuit assignments requested of (and approved by) the Chief Justice.[5]

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[3] The data exclude the U.S. Court of Appeals for the Federal Circuit. The D.C. Circuit lost one judgeship pursuant to the Court Security Improvement Act of 2007, but the Ninth Circuit gained a judgeship as of January 1, 2009, returning the overall total to 167—or 179 including the Federal Circuit. *See* 2008 JUDICIAL BUSINESS, ***supra***, at 38.

[4] A "judicial emergency" exists for "any vacancy where adjusted filings (i.e., filings excluding reinstated cases and weighting pro se appeals as one-third of a case) per panel are in excess of 700, or any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel." 2008 JUDICIAL BUSINESS, ***supra***, at 38.

[5] For example, in FY2007, Chief Justice Roberts authorized 116 inter-circuit assignments. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 11, *available at* http://www.uscourts.gov/library/annualreports/2007/2007%20FINAL%20REPORT.pdf. That figure represents a 41.5% increase over the 82 such assignments requested of—and approved by—Chief Justice Rehnquist for FY2000. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ACTIVITIES OF THE

The annual volume of *pending* appeals has also increased—from 42,224 in FY1999 to 53,071 in FY2008, a 25.7% rise. *See* 2008 JUDICIAL BUSINESS, *supra*, at 13. Thus, and unsurprisingly, the median time-to-decision in the courts of appeals increased more than 20%—from 10.5 months in 2003 to 12.7 months in 2008—with no let-up in sight. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2008, *available at* http://www.uscourts.gov/cgi-bin/cmsa2008.pl.[6]

### b. In Some Areas, the Substantive Nature of the Courts of Appeals' Workload Has Also Become More Complex

But the data tell only part of the story. The same period has also witnessed a subtle but profound change in the substantive nature of some classes of appellate review. In petitions for review in immigration cases, for example (a category that com-

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR 12, *available at* http://www.uscourts.gov/library/dirrpt00/2000.pdf.

[6] During the same time period, the real-dollar value of judicial budgets—including salaries—has decreased, leading to repeated calls from both Chief Justice Rehnquist and Chief Justice Roberts for congressional action to alleviate some of the financial pressures on the judiciary. *See, e.g.*, WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2–3 (2005), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf; JOHN G. ROBERTS JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–9 (2008), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf; *see also* Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 662–65 (2006) (noting the effects of economic constraints on the functioning of the courts of appeals).

prises as much as 40% of some circuits' dockets),[7] recent years have seen a documented upsurge in both the volume and the complexity of individual cases. *See generally* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court?: An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 14 (2007).

In particular, the Board of Immigration Appeals' adoption of "streamlining," where it affirms decisions by immigration judges without opinion, has shifted much of the burden in these cases directly to the courts of appeals. *See, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) (Posner, J.) ("This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."); *see also Immigration Litigation Reduction: Hearing Before the S. Comm. on the*

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[7] As a study by the then-Clerk of the Ninth Circuit demonstrated, immigration appeals comprised 41% of the Ninth Circuit's docket for FY2005, and 35% of the Second Circuit's. *See* Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 295 tbl.6 (2006) (citing 2008 JUDICIAL BUSINESS, *supra*, at 97–100 tbl.B-3); *see also* Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. 547 (2007).

*Judiciary*, 109th Cong., 2d Sess. 16 (2006) (statement of Hon. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit) (explaining that, as a result of streamlining, "the Court of Appeals becomes the first effective review of the immigration judge's decision").

It is impossible to quantify the uptick in difficulty of the typical appeal, but anecdotal evidence suggests that the changing substantive nature of federal appellate decisionmaking is more than just a short-term aberration limited to immigration cases. Indeed, one possible source of such evidence is the documented increase in the length of contemporary appellate opinions. *See, e.g.*, William M. Richman, *Much Ado About the Tip of the Iceberg*, 62 WASH. & LEE L. REV. 1723, 1726 (2005) [hereinafter Richman, *Tip of the Iceberg*].

### c. The Courts of Appeals Generally Lack Control Over Their Jurisdiction

The pressures created by both the quantity and quality of contemporary federal appeals are only heightened to the extent that the courts of appeals generally lack control over their jurisdiction—and are thus unable directly to control the size of their dockets. The vast majority of the courts of appeals' jurisdiction comes from 28 U.S.C. § 1291, pursuant to which appeals from final district court decisions are as of right. *See* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."). Similarly, the circuit courts' jurisdiction over virtually all petitions for review of administrative action is mandatory, *see*, *e.g.*, 28 U.S.C. §§ 1296, 2342, and the same goes for appeals of district-court orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," under 28 U.S.C. § 1292(a)(1).

Indeed, the only common basis for appellate jurisdiction over which the courts of appeals have any control is the power to accept interlocutory appeals certified by the district court under 28 U.S.C. § 1292(b).[8] Although § 1292(b) is an important means through which parties can obtain interlocutory appellate review (as discussed in more detail below), it provides the basis for jurisdiction in only a tiny fraction of the circuit courts' overall caseload.[9]

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[8] Parties may also seek interlocutory review, in extraordinary cases, by petitioning the court of appeals for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). Mandamus is not technically a basis for appellate jurisdiction, of course, but is rather an original action in aid of appellate jurisdiction. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.").

[9] Under FED. R. CIV. P. 23(f), appellate courts also have discretion to permit interlocutory appeals of class certification orders in class-action lawsuits. *See Vallario v. Vandehey*, 554 F.3d 1259, 1262 (10th Cir. 2009); *see also* 28 U.S.C. § 1292(e) (empowering the Supreme Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals" not otherwise provided for in § 1292); 28 U.S.C. § 2072(c) (empowering the Supreme Court to "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title").

Unlike § 1292(b), though, Rule 23(f) appeals are limited to a specific type of district court order in a specific type of case. *See*

### d. As a Result, the Courts of Appeals Have Increasingly Resorted to Alternative Means of Alleviating the Pressures on Their Dockets

As a result, and as judges and academic commentators alike have documented, circuit courts have increasingly resorted to other, less obvious means for dealing with their overcrowded dockets. As Judge Richard Posner has observed, these measures have included an increase in the number of cases decided without oral argument, an increasing resort to staff attorneys and other court personnel for assistance at various stages of the decisionmaking process, and an increase in the number of unpublished dispositions—even in cases that appear to be creating new law. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 160–75 (1996).

Reflecting on then-Justice Rehnquist's 1976 speech to the ABA, Judge Carolyn Dineen King—the former Chief Judge of the Fifth Circuit and the Chair of the Executive Committee of the Judicial Conference of the United States from 2002 to 2005—was even more direct:

> [O]ur efforts in a substantial number of the cases on our docket consists of directly supervising law clerks or indirectly supervising staff attorneys who delve into those cases and of

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*also, e.g.*, *id.* § 158(d)(2)(A) (conferring discretion upon the courts of appeals to entertain appeals of certain issues certified by the relevant district court or bankruptcy appellate panel); *id.* § 1453(c) (conferring a time-limited discretion upon the courts of appeals to entertain appeals of district court orders granting or denying remands of class actions removed under the Class Action Fairness Act of 2005).

> approving what they have done. We have not become administrators because any of us is lazy; all the judges on my court work very hard, much harder, in my view, than almost all of our peers in law practice. We have not done so because we wanted to; most of us would be more comfortable, that is, less worried about the accuracy and quality of our decisions, if we did more of the spade work ourselves. The simple fact is that we have been compelled to become administrators of an ever-larger team of lawyers by reason of the sheer volume of our caseload and the decision of Congress . . . to limit the number of judges on our court.

Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 679 (2006). And some jurists have suggested that this trend has produced a corresponding decline in the quality of appellate decisionmaking. *See* Stephen Reinhardt, *A Plea to Save the Federal Courts—Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 ("Those who believe we are doing the same quality work that we did in the past are simply fooling themselves.").

Academic assessments have reached similar conclusions. In a 1996 study, Professors Richman and Reynolds documented how, as a result of these measures, and "despite their statutory and historical role as courts of appeal, the circuit courts have become certiorari courts," William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275 (1996) (footnote omitted), forced to allocate resources based on the perceived importance of individual appeals. According to their analysis, the appellate courts have thus created two tracks for resolving appeals. In one track, which comprises about 20% of the courts' caseload, the judges apply the "traditional" model of appellate decisionmaking; in the other, comprising the remaining 80% of appeals, "most of the work . . . is done by a large corps of staff attorneys, typically recent law graduates, assigned to the court at large rather than any particular judge." Richman, *Tip of the Iceberg*, *supra*, at 1725 (footnote omitted). "Typically, the judges' input amounts to a 'conference,' lasting a few hours, in which a panel approves the staff attorneys' draft opinions in as many as fifty cases." *Id.*

Even in the specific context of unpublished appellate opinions, a 2001 study by Professors Merritt and Brudney underscored the incentives that increasing docket sizes created—at least prior to the adoption of new FED. R. APP. P. 32.1—to produce non-precedential opinions. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001) (providing a case study of the difference between published and unpublished opinions in petitions for review of NLRB decisions resolving unfair labor practice claims). *See generally* Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics, and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 21 (2005) (discussing Judge Richard Arnold's opposition to unpublished opinions, and explaining how "alternatives to traditional appellate decisionmaking can dilute the judiciary's accountability to the present and the future").

In short, and as Professor Baker has summarized, "we now take for granted what were once characterized as 'emergency' procedures. We have lowered our expectations for appellate procedure. We have defined down our appellate values." Thomas E. Baker, *Applied Freakonomics: Explaining the "Crisis of Volume,"* 8 J. APP. PRAC. & PROCESS 101, 114 (2005). To be sure, there is substantial and widespread disagreement over the proper means through which to relieve the pressures on contemporary appellate courts. Nonetheless, one point seems clear: anything that increases the already overloaded dockets of the courts of appeals will only heighten the burden on individual appellate judges, and provide further incentives to resort to unconventional—and perhaps inappropriate—measures for the resolution of individual appeals.

## II. BOTH CONGRESS AND THIS COURT HAVE CAREFULLY BALANCED THE INSTITUTIONAL ROLE OF THE COURTS OF APPEALS WITH THE NEED FOR INTERLOCUTORY APPEALS IN PARTICULAR CLASSES OF CASES

### a. Congress Created the Final Judgment Rule Both To Avoid Piecemeal Litigation and To Preserve the Proper Roles of the Trial and Appellate Courts Within the Federal System

Throughout the history of the federal judiciary, a consistent bulwark against unnecessary pressure on appellate dockets has been the final judgment rule, codified at 28 U.S.C. § 1291. *See, e.g.*, *Kerr v. United States Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) ("[P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation."). To that end, "[i]t has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Id.* (quoting *Will v. United States*, 389 U.S. 90, 96 (1967)).

More than just a tool for increasing the efficiency of litigation, the final judgment rule serves as an important statutory barrier to what might otherwise be a deluge of interlocutory appeals—appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt civil litigation toward the party with greater financial resources. As Justice Marshall explained, the final judgment rule

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "[avoiding] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." The rule also serves the important purpose of promoting efficient judicial administration.

*Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (alteration in original; citations omitted); *see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) ("In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.' " (citation omitted)).

And while protecting the dockets of appellate courts and avoiding piecemeal litigation are two of the important functions served by the final judgment rule, this Court has always been clear that the rule is no less important in protecting the authority and prerogative of the trial courts. As the Court explained in *Richardson-Merrell*, "[i]mplicit in § 1291 is Congress' judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." 472 U.S. at 436.

The district court's authority to "police the prejudgment tactics of litigants" is implicated all the more where discovery orders are at issue, since both this Court's jurisprudence and the Federal Rules of Civil Procedure have recognized that, as Justice Powell put it, "[t]he district court before which a case is being litigated is in a far better position than a court of appeals to supervise and control discovery and to impose sanctions for its abuse." *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081, 1087–88 (1979) (Powell, J., dissenting from the denial of certiorari).

### b. Congress Also Has Recognized the Need for Limiting Exceptions to the Final Judgment Rule

Of course, Congress has recognized that there will be circumstances in which an appeal after final judgment is inadequate to protect the interests of the aggrieved party, and in which the case for allowing an interlocutory appeal is stronger than that for denying it. The classic example is codified in 28 U.S.C. § 1292(a), which authorizes appeals of interlocutory district court orders that (1) relate to injunctions; (2) appoint receivers or refuse orders to wind up receiverships; and (3) determine rights and liabilities of parties in admiralty cases in which appeals from final decrees are allowed. *See* 28 U.S.C. § 1292(a).

Concerned that § 1292(a) was an inadequate exception to § 1291's more general bar on interlocutory appeals, Congress in 1958 empowered district courts in certain circumstances to certify additional issues for immediate interlocutory appeal under 28 U.S.C. § 1292(b). Specifically, the section authorizes certification of an otherwise unappealable order "[w]hen a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).[10] The court of appeals has the discretion to accept or decline the certificate, but this Court has broadly construed the scope of the circuit court's jurisdiction should it permit the appeal. *See, e.g.*, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("[A]ppellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court.").[11]

---

[10] For an early discussion of the origins and application of § 1292(b) from one of its champions, see Charles Alan Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199 (1959). *See generally* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975).

In extraordinary cases in which the district court declines certification (or in which certification is rejected by the court of appeals), petitions for writs of mandamus remain available under the All Writs Act, 28 U.S.C. § 1651(a). *See Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81 (2004). Although these two mechanisms for obtaining review of the district court differ in significant ways, both share one common thread: a threshold determination that appeal after final judgment will be fundamentally inadequate to protect the rights of the aggrieved party, *i.e.*, that the alleged injury created by the order under review will be effectively unredressable after further proceedings, and a judgment in the particular case that the costs of appeal (for both the parties and the courts) are sufficiently outweighed by the need for prompt review.

---

[11] There are also a modest number of statutes that provide for interlocutory appeals in specifically delineated cases, such as the Federal Arbitration Act, which allows an appeal from "an order . . . refusing a stay of any action under section 3 [of the Act]." 9 U.S.C. § 16(a)(1)(A); *see Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1900 (2009). In addition, district courts have discretion under the Federal Rules of Civil Procedure to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties . . . if the court expressly determines that there is no just reason for delay." FED. R. CIV. P. 54(b); *see also* BAKER, *supra*, § 3.05, at 47–49 (discussing the relationship between Rule 54(b) and interlocutory appeals).

### c. This Court Has Crafted the Collateral Order Doctrine As a Carefully Circumscribed Construction of § 1291

The collateral order doctrine is a variation on this theme. Formally articulated by this Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the doctrine's origins can be traced to an even earlier series of decisions adopting creative constructions of "finality." *See generally* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 557–63 (1932) (describing the malleability of "finality" in case law during the first part of the century). Thus, *Cohen* was an important step in the development of a more coherent rationale for the final judgment rule's allowance of appeals in particular classes of cases. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." (citation omitted)); *see also* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662–63 ("The need for [interlocutory appeals] must have seemed more pressing with the adoption of procedural rules that lengthened the pretrial process and made it less likely that cases would ever come to trial. One can thus see the collateral order doctrine as a result of the Rules' creating new stages of pretrial process without changing the final judgment rule.").

As this Court would later explain, the class of immediately appealable district court orders was limited to those that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Cohen*, 337 U.S. at 546 ("This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."). *See generally* BAKER, *supra*, § 3.03, at 42–45 (categorizing the criteria this Court has applied in considering the scope of the collateral order doctrine).

But the heart of the collateral order doctrine is not just the specific criteria that this Court identified in *Cohen* and its successors. Instead, it is a judgment about whether the court *ought* to permit an appeal before the case has come to its ultimate conclusion in the district court—whether the benefits of an immediate appeal outweigh the costs, in terms of both litigation and judicial resources. *See, e.g.*, *Digital Equip. Corp.* 511 U.S. at 878–79 ("[T]he third *Cohen* question, whether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement."); *see also Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine."). As Justice Souter recently explained,

> In each case [in which the collateral order doctrine has been upheld], some particular

> value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later.

*Will v. Hallock*, 546 U.S. 345, 352–53 (2006); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945-46 (2009) (noting that district court decisions rejecting a qualified immunity defense are immediately appealable because "qualified immunity . . . is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation' " (citation omitted)).

In other words, the collateral order doctrine necessarily presupposes that courts undertake a cost-benefit analysis—not with regard to the appealability of the particular order at issue, but with regard to the class of orders at issue and the impact that their appealability *vel non* may have on the "public interest." *See, e.g.*, *Digital Equip. Corp.*, 511 U.S. at 868 ("[We] have warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustice' averted, by a prompt appellate court decision." (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)) (alteration in original)); *see also Richardson-Merrell*, 472 U.S. at 439 ("This Court . . . has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case [appealability] determination."); *Carroll v. United States*, 354 U.S. 394, 405 (1957) ("Appeal rights cannot depend on the facts of a particular case.").[12]

These structural considerations help explain why this Court has so often emphasized the narrowness of the collateral order doctrine, the stringency of its requirements, and the need to police its boundaries carefully. *See, e.g., Will*, 546 U.S. at 350 ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope. . . . And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." (citation omitted)).

Thus, before deciding whether to extend the collateral order doctrine into new territory, this Court has always balanced—and must continue to weigh—the importance of the claimed right (and the potential deprivation that might occur without an interlocutory appeal) against the impact of a class-wide extension of appellate jurisdiction on both the workload of the courts of appeals and the case-management authority of the district courts during discovery.[13]

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[12] Focusing on the class of orders rather than the facts of the specific case is necessary in any collateral order case, since "[a]llowing appeals of right from non-final orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts. . . . a goal very much worth preserving." *Coopers & Lybrand*, 437 U.S. at 476.

[13] A comparable consideration has surfaced in this Court's jurisprudence respecting the existence of federal-question juris-

## III. EXTENDING THE COLLATERAL ORDER DOCTRINE TO DISCOVERY ORDERS DENYING THE APPLICATION OF EVIDENTIARY PRIVILEGES WOULD UPSET THAT DELICATE BALANCE

### a. The Existence of Other Means for Obtaining Relief Undermines the Justification for Extension of the Collateral Order Doctrine

Applying the considerations discussed above, it is clear that discovery orders finding waiver of the attorney-client privilege (or other comparable evidentiary protections) are not appropriately treated as categorically "final" under the collateral order doctrine. First, in factually appropriate cases, other means remain available for challenging district court decisions finding waivers of these privileges, including requests for certification under 28 U.S.C. § 1292(b), and/or petitions for writs of mandamus under 28 U.S.C. § 1651(a). *See, e.g., In re County of Erie*, 546 F.3d 222 (2d Cir. 2008) (granting a writ of mandamus to reverse a district court decision finding waiver of attorney-client privilege); *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc) (same); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996) (accepting certification under § 1292(b) as to whether a promise to waive attorney-client privilege in one lawsuit waives the

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diction under 28 U.S.C. § 1331. As Justice Souter noted four years ago, "it is the rare state quiet title action that involves contested issues of federal law. Consequently, jurisdiction over actions like [the Petitioner's] would not materially affect, or threaten to affect, the normal currents of litigation." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 319 (2005). In both sets of cases, this Court has been more open to modest extensions of federal jurisdiction than toward those extensions "threatening structural consequences." *Id.*

right to claim the same privilege in a separate case). These means of obtaining review will not always be available, *see, e.g.*, *Union County v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir. 2008) (explaining that § 1292(b) certification will not be appropriate in "typical attorney-client case[s]"), but that is precisely the point: it is only in novel or extraordinary cases that the ordinary discretion of district courts to manage discovery should be disturbed.[14]

Second, and relatedly, the question whether a party waived a particular evidentiary privilege is likely to be highly fact-specific. *See, e.g.*, *XYZ Corp. v. United States (In re Keeper of the Records)*, 348 F.3d 16, 23 (1st Cir. 2003) ("Claims of implied waiver [of attorney-client privilege] must be evaluated in light of principles of logic and fairness. That evaluation demands a fastidious sifting of the facts and a careful weighing of the circumstances." (citing 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE U.S. § 9:79, at 357 (2d ed. 1999))). Whereas both § 1292(b) and mandamus would allow for consideration of the very case-specific factual circumstances that might in the rare case warrant an interlocutory appeal,[15] a class-wide extension of appellate jurisdiction would not. Moreover, the fact-intensive nature of the inquiry will also mean that privilege claims in many of these cases will be virtually inseparable from the merits, further undermining the basis for allowing a collateral order appeal. *See, e.g.*, Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 763–66 (2006).[16]

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[14] An order denying a claim of privilege may also be reviewable if the subject of the order is held in criminal contempt or is not a party to the underlying proceeding. *See generally United States v. Ryan*, 402 U.S. 530, 532–34 (1971); *Perlman v. United States*, 247 U.S. 7, 13 (1918). Such cases will—and should—be rare.

[15] In that regard, it is curious (if not telling) that Petitioner chose not to seek certiorari from this Court to review the Eleventh Circuit's rejection of its petition for a writ of mandamus. *See Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1055 (11th Cir. 2008) (per curiam), *cert. granted*, 129 S. Ct. 1041 (2009).

Thus, and as this Court noted in comparable circumstances 15 years ago, "the discretionary appeal provision (allowing courts to consider the merits of individual claims) would seem a better vehicle for vindicating serious [privilege] claims than the blunt, categorical instrument of § 1291 collateral order appeal." *Digital Equip. Corp.*, 511 U.S. at 883; *see also id.* ("[T]he law is not without its safety valve to deal with cases where the [dispute] raises serious legal questions taking the case out of the ordinary run."); *cf. Cheney*, 542 U.S. 367 (explaining why mandamus would be the appropriate basis for appellate jurisdiction because of the unique separation-of-powers issues raised by the district court's sweeping discovery orders against the sitting Vice President).

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[16] As Robertson explains, in legal malpractice cases, "the court will not be able to decide whether privilege has been waived without examining the 'nature and content' of the plaintiff's claim to determine whether the attorney's conduct is truly at issue in the case." Robertson, *supra*, at 766. Similarly, in cases involving exceptions to the attorney-client privilege (*e.g.*, the crime-fraud exception), "parties' underlying claims are often based on the same alleged fraudulent conduct that could support an exception to the privilege." *Id.* In both sets of cases, "the merits of the underlying action would again often be 'intertwined' with the privilege claim." *Id.*

### b. Changes in Substantive Law Further Undermine the Justification for Extension of the Collateral Order Doctrine

Separate from the other potential procedural vehicles through which interlocutory review could be obtained, it also bears noting that the federal judiciary and Congress have both devoted significant attention in recent years to waivers of the attorney-client privilege. This focus culminated in the 2007 proposal for new Rule 502 of the Federal Rules of Evidence, and Congress's ratification of that proposal in September 2008. *See* Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3538.[17] As the Advisory Committee explained, Rule 502 serves two major purposes:

> 1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.

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[17] Specifically, Rule 502(a) provides as follows:

> When the disclosure [of information covered by the attorney-client privilege or work-product rule] is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

FED. R. EVID. 502(a).

> 2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.

FED. R. EVID. 502 adv. note.

The recent addition of Rule 502 further undercuts the appropriateness of extending the collateral order doctrine to this case in at least two ways: First, it suggests that both the Advisory Committee and Congress have been particularly attentive to rectifying the underlying substantive concern implicated by orders like that which Petitioner here seeks to appeal.[18] Second, notwithstanding the significant attention devoted to the problem of district-court decisions finding waiver of the attorney-client privilege, the drafters of Rule 502 do not appear to have considered providing that such orders *would* be immediately appealable.[19]

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[18] Questions as to the scope of new Rule 502 might instead be particularly well-suited for interlocutory appeals under § 1292(b), given that provision's specific dedication to questions of law "as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

[19] As noted above, Congress *did* specifically provide for permissive interlocutory appeals of district court orders granting or denying remand of class actions removed to federal court under the Class Action Fairness Act of 2005. *See ante* at 10 n.9 (citing 28 U.S.C. § 1453(c)). If nothing else, this recent development suggests that Congress knows how to specifically so provide, when it chooses.

### c. In Any Event, the Costs of Extending the Collateral Order Doctrine to Discovery Orders Denying the Application of Evidentiary Privileges Clearly Outweigh the Benefits

As explained above, though, even if other means of obtaining appellate review of orders such as the district court's order in this case were not available, and even if the changes in substantive law had not ameliorated the substantive issue raised by the Petitioner, the collateral order doctrine still should not apply. Instead, the question would become whether the benefit—providing the litigant with the opportunity to challenge a decision that might be effectively unreviewable after final judgment—outweighs the costs of providing an appeal as-of-right in all comparable cases.

At the outset, the number of attorney-client privilege claims that would be appealable under Petitioner's argument is particularly difficult to ascertain, but would likely be quite large. A search of Westlaw's "DCT" database for the second half of 2008 (July 1 through December 31), for example, reveals 498 cases discussing the attorney-client privilege, 234 of which included dispositions of privilege claims. Among those 234 dispositions, at least 104 included decisions that the privilege had been waived, that it did not apply, or that it applied to some communications but not others. In each of these instances, the arguments made by Petitioner here would have the same force, and extension of the collateral order doctrine to these facts would compel its extension to those, as well. Even though these figures are necessarily quite conservative—most district court decisions do not make it into commercial databases, *see* Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 976 (2008) ("[B]etween 80% and 95% of 'substantive' district court opinions go unpublished . . . .")—they suggest that the extension of the collateral order doctrine to these kinds of claims would add at least (and perhaps well over) several hundred attorney-client privilege appeals each year to already overcrowded appellate dockets.

Moreover, there are virtually no principled bases of distinction between the district court decision in this case and thousands of decisions every year in which district courts reject the applicability of *other* evidentiary privileges. Little, for example, separates the interests implicated by the attorney-client privilege from those implicated by the attorney work-product rule. *See, e.g.*, *Montgomery County v. Microvote Corp.*, 175 F.3d 296, 300 (3d Cir. 1999) (calling for the same appealability treatment for "the attorney-client and work-product privileges").

Only slightly more differentiates these law-practice-related privileges from other run-of-the-mill evidentiary protections designed to protect the confidentiality of communications, such as those between spouses, between patients and their doctors, or between penitents and their priests. The argument in each case is necessarily the same—that a district court order compelling disclosure of such privileged material simply cannot be remedied by a post-judgment appeal; the proverbial cat will be out of the bag.[20] As this Court's decisions have implicitly recognized, *Cohen* is a "trans-substantive" rule, and is therefore difficult to reconcile with factual distinctions between substantively similar legal claims. Thus, the only plausible basis for treating the attorney-client privilege and the work product rule differently is because of their centrality to legal practice—not because they are normatively more important to the protected parties than the other well-recognized evidentiary privileges. *See, e.g.*, Benjamin H. Barton, *Do Judges Systematically Favor the Legal Profession?*, 59 ALA. L. REV. 453, 465–72 (2008) (suggesting that courts have often protected the attorney-client privilege more carefully for reasons unrelated to the privilege's substance).[21]

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[20] A similar argument would be available whenever a district court ordering disclosure rejects a claim of confidentiality based upon such grounds as trade secrecy or a confidentiality agreement.

These are all just pieces of a larger puzzle, but they underscore the central point—that judicially compelled disclosure of confidential information can come in many forms, and that as a result, this case makes for a singularly inappropriate extension of the collateral order doctrine, and would risk converting the exception into the rule. District courts would lose a substantial part of their discretion to control discovery and to otherwise provide for efficient case management, and, at the same time, the already overburdened appellate courts would see their caseloads increase dramatically, fundamentally inverting the institutional role of the trial and appellate courts in the federal judicial system. *See Firestone Tire & Rubber Co.*, 449 U.S. at 378 ("Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291.").

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[21] Although the question is not squarely presented here, a decision allowing an appeal at this stage of a civil proceeding would virtually compel the allowance of an appeal in the analogous criminal context, when testimonial evidence given in secret is admitted despite a claim that it was given under a grant of immunity. *But see United States v. Poindexter*, 859 F.2d 216 (D.C. Cir. 1988) (per curiam) (rejecting a collateral order appeal where defendants claimed that their grand jury was tainted by testimony they gave to Congress under a statutory grant of immunity).

## CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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# APPENDIX

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MOHAWK INDUSTRIES, INC.,
*Petitioner,*
v.
NORMAN CARPENTER,
*Respondent.*

**On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* DRI—the Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the availability, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, and to promote the role of the defense attorney in that system. DRI has long been a voice in the ongoing effort to protect the right to counsel and to make the civil justice system more fair and efficient.

Preservation of the attorney-client privilege is one of DRI's greatest concerns. That privilege is absolutely necessary to facilitate frank and open communications between attorney and client, and to ensure zealous and effective representation. It has become even more important in recent years, as attorneys have assumed greater responsibility for advising on complex legal issues and investigating possible violations. The privilege is essential not only to the adversarial process, but to the judicial and regulatory system as a whole.

That system is threatened by the judgment below. The court of appeals held that a party whose claim of privilege is incorrectly rejected has no immediate recourse, but must—if it wishes to avoid a contempt citation—disclose the information and forever relinquish its confidentiality. Pet. App. 10a-11a, 13a. This rule will undermine confidence in the privilege and cause individuals and corporations to withhold information from their counsel and to refrain from investigating or reporting potential regulatory violations. By denying a right to immediate appeal, the decision below undercuts the interests the privilege is intended to serve.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have received notice of *amicus curiae*'s intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

DRI submits this brief in support of a vigorous attorney-client privilege, consistent with the long tradition of protecting confidential communications from disclosure in all but the most extreme situations. To preserve the privilege, and to support the adversarial process and the administration of justice, this Court should reverse the judgment below and hold that rulings denying a party's privilege claim are subject to immediate appeal.

## SUMMARY OF THE ARGUMENT

The collateral order doctrine permits immediate appeal of decisions which, among other things, address issues of importance. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The issue here, the scope of the attorney-client privilege, undoubtedly qualifies as "important."

The privilege is critical to the judicial system. Attorneys can represent clients effectively only when they are made aware of *all* relevant information—good and bad—and clients will be willing to share this information only if they are confident that their communications will remain confidential. It is for this reason that the attorney-client privilege for centuries has been treated as sacrosanct and fundamental to the adversarial process. *E.g.*, *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888).

The privilege has only gained in importance in recent years, as the regulatory requirements imposed on corporations have expanded. Government officials cannot themselves monitor and report on every corporation (much less every corporate division); rather, they must rely on information provided by corporations themselves, often developed through internal investigations by corporate counsel. A corporation will be willing to authorize these investigations, and disclose the results to a government agency, only if it is assured that the findings and conclusions will be maintained in strict confidence, and will not be subject to disclosure to third parties in the normal litigation process.

This case presents a stark example. Mohawk Industries, Inc., conducted an internal investigation following a report of possible violations of federal immigration law. Pet. App. 5a. That investigation resulted in the termination of an employee who may have facilitated the violations, as well as a denial of employment to an applicant who could not produce proof of citizenship. *Id.* These matters were obviously sensitive—particularly given the pendency of a class action alleging that Mohawk itself conspired to hire illegal aliens—but Mohawk could proceed with the investigation, and take corrective action, with confidence that the findings and results would be protected from disclosure under the attorney-client privilege.

The decision below undermines that confidence. By precluding immediate appeal from adverse privilege rulings, the decision virtually guarantees that the privilege will be improperly denied—and forever lost—in some cases. Unlike rulings on other discovery or evidentiary issues, which can be corrected after final judgment, an order rejecting a claim of privilege and directing disclosure of confidential materials has immediate and irrevocable consequences. Once confidentiality is lost, it cannot be regained, even if the materials themselves are later returned. And an incorrect privilege holding in *any* case, if it results in disclosure of confidential communications, will necessarily reduce confidence in the privilege generally, inducing other clients and counsel to limit their communications and forgo internal investigations. The result would be a breakdown not only in attorney-client relations, but in the regulatory system that Congress envisioned and the Executive adopted.

Interests in finality do not counsel against immediate appeal. There is no evidence that courts which allow these appeals have been flooded with claims, or that adjudications have been deferred or delayed. There is, in fact, every reason to believe that permitting immediate appeal will conserve resources, by ensuring that the improper disclosure of confidential information does not infect an entire proceeding and prevent (or prolong) trial or re-trial.

The attorney-client privilege is the bulwark of our adversarial system and regulatory structure. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) ("[The privilege] promote[s] broader public interests in the observance of law and the administration of justice."). There can thus be no doubt of its "importance," both to the judicial system and to society as a whole. Adverse privilege rulings should, for that reason, be immediately appealable under the collateral order doctrine, before confidentiality is lost and irrevocable damage—both to the client and to the system—is done.

## ARGUMENT

Orders of a district court are normally appealable only after final judgment, when all matters can be brought to the attention of the appeals court concurrently. *Sell* v. *United States*, 539 U.S. 166, 176 (2003). An exception exists for a limited class of orders which are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred." *Cohen*, 337 U.S. at 546. These "collateral orders," subject to immediate appeal, are distinguished by three characteristics: (1) they "'conclusively determine[ ] the disputed question,'" (2) they "'resolve[ ] an important issue completely separate from the merits of the action,'" and (3) they are "'effectively unreviewable on appeal from a final judgment.'" *Sell*, 539 U.S. at 176 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

The parties are well-positioned to address the first and third prongs, as well as the "separateness" factor. Pet. Br. 18, 20-27. The "importance" factor, however, transcends this particular case. Whether an issue is "important" for these purposes requires a qualitative evaluation of the issue—here, the scope of the attorney-client privilege—to determine whether the benefits of immediate appeal outweigh the interests served by the final judgment rule. *E.g.*, *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994).

There can be little doubt as to the outcome of this weighing process here. The attorney-client privilege is fundamental both to the adversarial system and to the administration of justice. *Upjohn*, 449 U.S. at 389. It is the *sine qua non* of the attorney-client relationship and effective representation, and promotes corporate self-governance and regulatory goals by ensuring that corporations have the incentive and ability to conduct internal investigations and report potential issues to the government. *Id.* at 392. To preserve these benefits, questions concerning the scope of the privilege must be deemed "important," and decisions rejecting the privilege should be subject to immediate appeal as collateral orders.

## I. THE ATTORNEY-CLIENT PRIVILEGE IS FUNDAMENTAL TO THE ADVERSARIAL PROCESS.

The attorney-client privilege lies at the "heart of the adversary system." *Kelly* v. *Ford Motor Co. (In re Ford Motor Co.)*, 110 F.3d 954, 961 (3d Cir. 1997). That system depends upon effective legal advocacy, and effective legal advocacy in turn depends upon open and confidential communications between client and counsel. *Upjohn*, 449 U.S. at 389. For this reason, the privilege has for centuries been recognized as integral to the adversarial process. See, *e.g.*, *Hunt*, 128 U.S. at 470.

1. The adversarial system is built upon the attorney-client relationship. See, *e.g.*, Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1061-62 (1978). Representation by an attorney, well-versed in the law and knowledgeable of the facts, has long been deemed essential for enabling a client to plead and prove, or oppose and defend, claims before a court. *E.g.*, *Hunt*, 128 U.S. at 470 (noting "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice"). Only when each side is represented by a capable attorney does the adversarial system function as intended, distilling the relevant facts and producing the proper result. *Ford*, 110 F.3d at 961-62 ("[C]ompetition between

vigorous and effective advocates . . . will help produce the best legal result in any given litigation."). When the right to an attorney is denied, or the relationship between client and counsel is impeded, presentation of the case suffers, and the adversarial process breaks down. See *id.*

Confidentiality of attorney-client communications sustains this process. *Upjohn*, 449 U.S. at 389. For an advocate to understand and prepare the client's case, the client "must be free to disclose everything, bad as well as good." Hazard, *supra*, at 1061; see also *Chase Manhattan Bank* v. *Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992) ("[A] client's full disclosure to an attorney is a necessary predicate to skillful advocacy and informed legal advice."). The client must be assured that the attorney will not disclose the information voluntarily (something usually precluded by rules of professional responsibility), and also will not be obliged to do so by subpoena or court order. See *Restatement (Third) of the Law Governing Lawyers* § 68, cmt. c (2002) ("[C]onfidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services."). Likewise, to represent a client's interests effectively, an attorney must be able to manage when (and what) information is withheld, and when (and how) it is disclosed. See *id.* The attorney-client privilege makes all of this possible, drawing a veil over attorney-client communications, removing the "apprehension of compelled disclosure," and granting client and attorney the ability to decide upon the timing and extent of any disclosure. 8 John Henry Wigmore, *Evidence* § 2291 (McNaughton rev. 1961). The privilege also fosters an important sense of loyalty between attorney and client, by assuring the client that the attorney will not—even under subpoena—be required to disclose any confidences. John W. Strong, *McCormick on Evidence* § 87 (5th ed. 1999); see also *Ford*, 110 F.3d at 961.

Beyond advancing the attorney-client relationship, the privilege affirmatively "promotes . . . compliance with the law." *United States* v. *Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 531 (2d Cir. 2005). By protecting attorney-client communications from disclosure, the privilege encourages parties to step forward and seek legal advice before engaging in a particular course of conduct. See *Upjohn*, 449 U.S. at 392. This allows them to avoid potential legal violations, or at least to correct violations quickly. See *id.* Denial of the privilege has the opposite effect, discouraging parties from seeking legal counsel and thereby increasing the risk that a violation will occur and go unremedied, particularly as the complexity of the regulatory system grows. See, *e.g.*, Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 Vill. L. Rev. 469, 479-80, 486 (2003). A robust privilege protects the adversarial process, and also enables clients to avoid becoming embroiled in that process in the first place.

These considerations are equally true when the client is a corporation, rather than an individual. Paul R. Rice, *Attorney-Client Privilege in the United States* § 2.3 (2d ed. 1999). Corporations have long been considered "persons" in the eyes of the law, and they are entitled to the assistance of counsel to advise them on their legal rights and obligations. *Upjohn*, 449 U.S. at 390 (citing *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915)); see also *Restatement (Third) of the Law Governing Lawyers* § 73. No less than a natural person, a corporate client requires the protection of the attorney-client privilege to ensure effective and zealous representation within the adversarial system. *E.g.*, *Upjohn*, 449 U.S. at 390.

2. These benefits explain why the attorney-client privilege has been recognized, in some form, for nearly as long as there has been litigation. *Swidler & Berlin* v. *United States*, 524 U.S. 399, 403 (1998) ("The attorney-client privilege is one of the oldest recognized privileges for confidential communications."); see also Rice, *supra*, §§ 1.1-1.13. Many sources date the privilege to Roman law, which barred advocates from testifying against their clients on the ground that such testimony constituted an immoral breach of duty and was therefore "unworthy of belief." Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 Notre Dame L. Rev. 157, 160 (1993). The privilege appeared in English courts at least as early as the Elizabethan Era. 8 Wigmore, *supra*, § 2290. Similar to its Roman forebear, this conception of the privilege was tied to a code of honor, under which a barrister could not be required to reveal a client's secrets, so as to protect the barrister's reputation. Strong, *supra*, § 87.

The privilege was adopted early in American jurisprudence, and was soon acknowledged as fundamental to the attorney-client relationship. 8 Wigmore, *supra*, § 2290; see also Rice, *supra*, §§ 1.1-1.13; Hazard, *supra*, at 1087-91. It was explicitly recognized by this Court in the nineteenth century, see *Hunt*, 128 U.S. at 470, and has since been adopted by all jurisdictions in the United States. *Ford*, 110 F.3d at 962. Indeed, the attorney-client privilege is the *only* communications privilege that is uniformly recognized across the country. See Stewart E. Sterk, *Testimonial Privileges: An Analysis of*

*Horizontal Choice of Law Problems*, 61 Minn. L. Rev. 461, 463 n.8 (1977).[2]

* * * *

Only when communications between counsel and client are privileged from disclosure can the attorney-client relationship flourish and the adversarial process function. *Restatement (Third) of the Law Governing Lawyers* § 68, cmt. c; see also Cole, *supra*, at 479-80. That privilege is not simply "important" to our system—it is absolutely fundamental.

## II. THE ATTORNEY-CLIENT PRIVILEGE IS FUNDAMENTAL TO THE ADMINISTRATION OF JUSTICE.

The attorney-client privilege is also critically important to the administration of justice, particularly our corporate regulatory structure. That structure has grown increasingly reliant on reports from corporate counsel resulting from internal investigations. These investigations can occur only because of the protections offered by the attorney-client privilege.

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[2] *See also, e.g.*, *Wesp* v. *Everson*, 33 P.3d 191, 201 (Colo. 1991) ("The goal of the [attorney-client] privilege is to encourage clients to confide all pertinent information in their attorneys to ensure the orderly administration of justice."); *People* v. *Knuckles*, 650 N.E.2d 974, 983 (Ill. 1995) ("The 'centrality of open client and attorney communication to the proper functioning of our adversary system of justice' requires the recognition that the attorney-client privilege must prevail despite its effect of withholding relevant information from the fact finder.") (quoting *United States* v. *Zolin*, 491 U.S. 554, 562 (1989)); *Suffolk Constr. Co.* v. *Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 36 (Mass. 2007) ("[T]he attorney-client privilege is a fundamental component of the administration of justice.").

1. Corporations across this country conduct thousands of internal investigations each year. See Louis M. Brown et al., *The Legal Audit: Corporate Internal Investigation* §§ 1.1-1.10, 2.1-2.25 (2006). These may be small inquiries, following up on a discrete complaint, or massive undertakings, assessing systemic breakdowns in policy or violations of law. *Id.*; see also Dan K. Webb et al., *Corporate Internal Investigations* (1993). But they almost all share a common denominator: involvement of an attorney. See Brown et al., *supra*, §§ 4.1-4.34. Consultation with an attorney is the first, and often the last, step in any internal investigation. *Id.*; see also Webb, *supra*, § 4.03.

The early and continuing involvement of counsel is critical precisely because of the attorney-client privilege. Internal investigations are, by their nature, sensitive affairs that carry risks of embarrassment or civil or criminal liability. Brown et al., *supra*, §§ 2.1-2.25; Webb, *supra*, at v. It is for that reason essential, from the corporation's point of view, that they be conducted in the utmost secrecy. A corporation would have no incentive to conduct an investigation into its own affairs—and in fact would be positively disinclined to do so—if the process and results would be made public. See Cole, *supra*, at 486 ("Failing to afford the protection of the attorney-client privilege to communications between business entities and their legal counsel would have a chilling effect on internal investigations of corporate activities.").

These considerations supported this Court's decision in *Upjohn* to uphold the privilege as applied to communications between corporate employees and counsel during an internal investigation:

> In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," particularly since compliance with the law in this area is hardly an instinctive matter. . . . [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.

449 U.S. at 392-93 (citations omitted). Corporations *must* conduct investigations if they are to monitor their own conduct, and they will do so only if communications and results from the investigations may be held in confidence. *Upjohn* recognized this fact, and largely for that reason upheld the corporation's privilege claims. *Id.* at 391-92.

2. Internal investigations are important for the corporation itself, as *Upjohn* acknowledged. *Id.* at 391. But they are now increasingly important to our entire regulatory structure. This is demonstrated most clearly by two recent measures: the Sarbanes-Oxley Act of 2002 (and implementing regulations), and corporate prosecutorial directives issued by the Department of Justice.

a. Sarbanes-Oxley represented a significant shift in corporate regulation and, particularly, the relationship of corporate counsel to government. The Act directed the Securities and Exchange Commission to impose a duty on corporate counsel "to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof" to the company's chief legal or executive officer and, if an "appropriate[ ] respon[se]" is not forthcoming, to report the violation to the audit committee of the company's board of directors or the board itself. 15 U.S.C. § 7245. The SEC responded by promulgating rules requiring corporate attorneys (whether in-house or outside) to report "material violation[s]"—defined as violations that an objective, prudent attorney would view as a material violation of federal or state law—"up the ladder" to the chief legal counsel, the chief executive officer, and finally the board of directors. 17 C.F.R. § 205.3(b)(1). Those rules also allow (but do not mandate) an attorney who does not receive an "appropriate respon[se]" to withdraw from representing the corporation and to "reveal to the Commission, *without the issuer's consent*, confidential information related to the representation" in order to prevent or rectify a violation. *Id.* § 205.3(d)(2) (emphasis added).

These rules arguably place corporate attorneys in a new role: investigator for the United States. See, *e.g.*, Robert A. Del Giorno, *Corporate Counsel as Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, Champion, Aug. 2003, at 22-26. Counsel may now have responsibility not only to the corporation, but to the public. *Id.*

The rules also increase the importance of internal investigations. They assume that corporations will continue to conduct them and that counsel will thereby be able to learn of (and report) violations. William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. Crim. L. & Criminology 621, 635 n.58 (2006). But, of course, corporations will be willing to continue this practice only if they are assured of some control over the results. See Cole, *supra*, at 486. That control must be found in the attorney-client privilege.

b. The importance of internal investigations, and of the privilege, was further highlighted by a series of prosecutorial directives issued by the Department of Justice in 1999, 2003, and 2006. Those directives allowed federal prosecutors investigating a "corporate target" to consider, in assessing the target's "cooperation" for purposes of deciding whether to prosecute and what charges to bring, whether the corporation had waived its attorney-client privilege and agreed to disclose confidential materials.[3]

Those directives, much like the Sarbanes-Oxley regulations, seemingly "deputized" corporate counsel as investigators for the government. Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 St. Mary's L.J. 1065, 1066 (2007). Corporate attorneys may be well aware when conducting internal investigations that their findings and conclusions could later be disclosed to federal officials in order to demonstrate "cooperation" and avoid prosecution—particularly since indictment is often the death knell for a corporation. Webb, *supra*, §§ 16.01-16.15; see also Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. Rev. 1, 26 (2008); cf. Timothy P. Harkness & Darren LaVerne, *Lying to In-House Counsel May Lead to Prosecution*, Nat'l L.J., July 27, 2006 (noting cases in which corporate employees were successfully prosecuted for obstruction of justice based on misstatements to *corporate counsel* during internal investigations). Corporate counsel in this situation are thus arguably serving the interests of both the client and the government.[4]

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[3] Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to Heads of Department Components and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999); Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003); Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006); *see also infra* note 5 (describing fourth DOJ memorandum).

These developments render the attorney-client privilege all the more important. Assertion of the privilege serves as the corporation's most significant—if not its only—protection in dealing with prosecutors.[5] See, *e.g.*, Webb, *supra*, §§ 16.01-16.15. And the availability of the privilege is the only reason, in this environment, that a corporation would conduct an internal investigation. Without the privilege, a corporation's findings would be open to prosecutors upon a simple subpoena, leaving no incentive for prosecutors to seek corporate cooperation or for corporations to conduct internal investigations in the first place.

* * * *

Preservation of the attorney-client privilege is necessary to advance not only the corporation's interests, but also the overall administration of justice. Corporations can hardly be expected to investigate internal wrongdoing if their findings will be subject to immediate disclosure, and they can hardly be expected to share those findings with enforcement authorities unless they have some incentive to do so. Maintenance of a full and robust privilege ensures that corporations will have the protection and the motivation to investigate possible wrongdoing and to report potential violations to the government.

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[4] Numerous authorities have commented on the conflicts of interest and other problems these directives create. *See generally* Marks, *supra*.

[5] It is unclear whether federal prosecutors are still permitted to request waivers of the attorney-client privilege, in light of a DOJ memorandum issued on August 28, 2008. *See* Memorandum from Mark Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008). That memorandum prohibits prosecutors from asking for waivers of the privilege as applied to "core" attorney-client communications. *Id.* at 9. However, it does not define "core" and may be read to allow prosecutors to seek waivers of privilege for "non-core" attorney-client communications (whatever those may be). *Id.* at 8-9.

## III. THE BENEFITS OF PROTECTING THESE IMPORTANT INTERESTS BY ALLOWING IMMEDIATE APPEAL OF ADVERSE PRIVILEGE DECISIONS OUTWEIGH THE INTEREST IN FINALITY.

There can be little question, in light of the foregoing, that preservation of the attorney-client privilege is "important." No federal court has held otherwise—even those that have refused to permit immediate appeal, see, *e.g.*, Pet. App. 11a-12a—and this Court itself has characterized the privilege as "important" and necessary to the "'administration of justice.'" *Upjohn*, 449 U.S. at 386, 389 (quoting *Hunt*, 128 U.S. at 470). The same reasoning supports a right to immediate appeal from adverse privilege rulings.

1. This Court said in *Upjohn* that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393. Refusing to allow immediate appeal from adverse privilege rulings results in precisely this uncertainty. Only if review is immediately available can a consistent and effective privilege be ensured.

The most obvious reason for immediate appeal is that, once rendered and enforced, an adverse privilege ruling cannot be rectified. These orders typically arise during discovery, and a district court that finds the privilege inapplicable will often direct that the requested information be disclosed forthwith or by a date certain. See, *e.g.*, *Ford*, 110 F.3d at 957. Without a right to immediate review, a party subject to such an order (and that wishes to avoid contempt) has no choice but to comply and produce the information. Pet. App. 11a-12a. And, once produced, confidentiality is forever lost. *Ford*, 110 F.3d at 964. Produced documents can be returned, but the information will never again be private. *Id.*

This illustrates the flaw in the reasoning of the court below. The court of appeals found that post-judgment appeal of adverse privilege rulings was adequate to protect the privilege because an appellate court could order the return of documents and, if necessary, a new trial at which those documents could not be introduced. Pet. App. 13a-14a. But the privilege does not merely shield documents from introduction at trial; it ensures that the confidences reflected in them will not be exposed to the opposing party, much less to the public at large. See Brown et al., *supra*, §§ 4.1-4.34; see also *Upjohn*, 449 U.S. at 386-89; 8 Wigmore, *supra*, § 2291. That damage is done once the documents are disclosed, and it cannot be undone by ordering a new trial.

2. The practical consequences of allowing an adverse privilege ruling to stand, without immediate appeal, can be severe for clients. Many clients may prefer—or be forced—to settle a case rather than comply with a disclosure order. Cf. *Tenet* v. *Doe*, 544 U.S. 1, 11 (2005) ("Forcing the Government to litigate these claims [by former covert agents] would also

make it vulnerable to 'graymail,' *i.e.*, individual lawsuits brought to induce the CIA to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations."). Privileged materials are by their nature sensitive and confidential, and their disclosure—even under a protective order—may risk a company's profitability, or in some circumstances even its viability. The only choice that a company may have, when presented with an order compelling disclosure of sensitive information, is simply to give up its defense and settle the claims, even if those claims are baseless and stand little or no chance of success. These compelled settlements already occur with some regularity, as DRI's members well know, and they will only increase if an opportunity for immediate appeal is wholly foreclosed.

It is no answer to point, as some have, to a contempt citation as an avenue for appellate review. For one thing, a civil contempt citation is not subject to interlocutory appeal. *E.g.*, *Powers v. Chi. Transit Auth.*, 846 F.2d 1139, 1141-42 (7th Cir. 1988) (citing *Fox* v. *Capital Co.*, 299 U.S. 105 (1936), and *Doyle* v. *London Guar. & Accident Co.*, 204 U.S. 599 (1907)). This means that the cited party must endure the sanctions imposed by the court throughout the course of litigation, a burden which may be impossible for individuals and companies to bear—particularly when the sanction includes (as it often will) a fine that accrues on a daily basis. *E.g.*, 15B Charles Alan Wright et al., *Federal Practice & Procedure* § 3917 (2d ed. 1992). Moreover, a party that willfully disobeys a disclosure order runs the risk of being found in *criminal* contempt, and potentially subject to even harsher sanctions. See *In re Sealed Case*

*No. 93-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (per curiam); see also 15B Wright, *supra*, § 3914.23. Those sanctions will stand even if the disclosure order is later found—on appeal from the final judgment—to be invalid. See *Sealed Case*, 151 F.3d at 1065; see also 15B Wright, *supra*, § 3914.23.

Many companies will be unable or unwilling to bear these sanctions, or the stigma attached to a finding of contempt. Again, they will instead choose simply to settle the claims, because the dangers posed by disclosure outweigh the company's interest in the litigation.

It cannot be that a party must accept sanctions and a contempt citation, or abandon a meritorious defense, as the inherent cost of preserving the confidentiality of attorney-client communications. See *United States* v. *Philip Morris Inc.*, 314 F.3d 612, 620 (D.C. Cir. 2003). A rule conditioning appellate rights on willful disobedience of a court order, beyond its inherent unseemliness, carries the same risk to the privilege as a wholesale prohibition on appeal and cannot serve as a substitute for a right to immediate appellate review.

3. The ramifications of an incorrect privilege ruling, if not corrected, extend well beyond the parties and proceedings in a particular case. The corporation subject to the ruling, which had taken all appropriate steps to maintain the confidentiality of its investigation, will limit future investigations to avoid documenting or discussing confidential information, or may dispense with investigations altogether. Other corporations will be on notice that the federal courts cannot be relied upon to enforce the privilege consistently, and those corporations will therefore also be less willing to engage in

investigations, of any type. The result will be a wide-scale decrease in internal investigations.

The risk of incorrect decisions is significant. District courts often must address hundreds of issues in a single case, preventing them from devoting substantial time to any individual question. The sheer volume of litigation at the trial level, with the variety and number of issues presented in each case, virtually ensures that mistakes will be made in privilege determinations.

These risks are not nearly so prevalent at the appellate level. Caseloads at the courts of appeals are smaller than at the district courts, and appellate courts are able to give questions of privilege the consideration they deserve—particularly when those questions are presented alone in the context of a collateral order appeal. This increased focus ensures greater consistency and certainty in privilege rulings. And, as this Court has noted, consistency and certainty are vital to a viable privilege. See *Upjohn*, 449 U.S. at 393.

The availability of immediate appeal reduces the possibility that an incorrect ruling will go uncorrected, and reduces the risks to corporations from conducting internal investigations. Indeed, only with this assurance will corporations be sufficiently protected and induced to continue the corporate investigations that have become an integral part of the regulatory structure.

4. No other interests outweigh these concerns. Indeed, the interest in finality—the most relevant countervailing consideration in assessing "importance" under the collateral order doctrine, see *Digital Equip.*, 511 U.S. at 879—supports immediate appeal.

One of the primary arguments against recognizing a right to immediate appeal is that it will result in a flood of new appeals, inundating appellate courts with discovery issues. *E.g.*, Pet. Resp. 23. There is, however, no evidence to support this fear. Circuits that allow such appeals have not reported a flood of filings, and a review of reported decisions suggests that privilege issues constituted a roughly equivalent share of these circuits' dockets both before and after those appeals were first allowed. In fact, the three circuits that permit immediate appeal of adverse privilege rulings actually experienced a net *decrease* in the number of reported cases raising privilege issues in the two years after those appeals were first allowed, as compared to the preceding two-year period.[6] Moreover, the number of reported privilege cases in any one of these years, which never exceeded ten, represented an extraordinarily small percentage of the more than 1,000 total filings in each of the circuits (with more than 10,000 in the Ninth Circuit).[7]

Nor is there any reason to believe that the interest in finality, concerned principally with the avoidance of "piecemeal" litigation, would be undercut by permitting immediate appeal. Disputed privilege issues do not arise in every case, or apparently with substantial frequency, and in any event appeals would be allowed only in cases in which the district court ruled *against* recognition of the privilege (since a decision upholding the privilege would pose none of the risks justifying immediate appeal of an adverse ruling). And, even in those cases, district court proceedings could continue while these issues are addressed at the appellate level, meaning that there would be little—if any—diminution of trial court efficiency.

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[6] A total of 24 appeals raising privilege issues were reported in these circuits in the two-year period before immediate appeals were first allowed, while only 22 such appeals were reported in the two-year period thereafter. These appeals were identified through a search of Westlaw for decisions using the phrase "attorney-client privilege" more than once.

[7] Statistics compiled by the Administrative Office of the U.S. Courts indicate that, for the year in which each circuit issued its decision permitting immediate appeals, there were 3,458 total filings in the Third Circuit (in 1997), 1,121 filing in the D.C. Circuit (in 2003), and 12,549 filings in the Ninth Circuit (in 2007). *See* Admin. Office of U.S. Cts., *Federal Court Management Statistics* (last visited Apr. 29, 2009), *at* http://www.uscourts.gov/fcmstat/index.html.

5. Judicial administration and efficiency may in fact be advanced by permitting immediate appeals. The impact of an incorrect privilege ruling is not limited to introduction of a particular document at trial. The information obtained by opposing counsel may lead to the discovery of other information, and perhaps to a whole new theory of liability. See *Chase*, 964 F.2d at 165 ("[Disclosure of privileged] documents may alert adversary counsel to evidentiary leads or give insights regarding various claims and defenses."). That information can also be used by other parties, and may be publicly disclosed if the matter goes to trial. The effects of disclosure may extend far beyond the particular case, affecting future proceedings and even a client's ability to compete in the marketplace.

These effects may be impossible to remedy after final judgment. There is no way that an appellate court can restore the confidentiality of information once disclosed, see *id.* ("[A]ttorneys cannot unlearn what has been disclosed to them in discovery."), and the impact of disclosure on trial will often be unclear, see *id.* ("Some of the economies gained by the practice of pre-adjudication disclosure may thus be offset by later proceedings seeking to unscramble the effects of the disclosure of materials subsequently held to be privileged."). This means that traditional doctrines such as harmless error, used to avoid addressing issues whose resolution played no substantive role in the judgment, are largely useless: if a court cannot identify the precise impact of an incorrect ruling, it cannot decide whether that ruling was or was not material to the ultimate decision. See *id.* The only option in this circumstance is to remand the case for a new trial. But, on remand, the trial court will have to try to identify and exclude any evidence or information discovered as a result of the mistaken ruling, which—as discussed—may be impossible. *Id.*

Far from serving the interest in finality, the lack of a right to immediate appeal from an adverse privilege ruling may actually prolong litigation or even preclude its resolution. In any event, any possible benefits from prohibiting immediate appeal are plainly outweighed by the importance of the privilege issue.

* * * *

The attorney-client privilege is critical both to the adversarial system and to the administration of justice. An incorrect ruling concerning privilege has substantial adverse ramifications not only for the parties to the case—forced to disclose confidential information—but also for others who rely on the inviolability of the privilege in conducting their affairs. Whatever limited burdens may arise from immediate appeals in this situation are plainly outweighed by the dangers of allowing incorrect decisions at the trial level to stand. Only the option of immediate appeal can provide the consistency and certainty necessary to preserve and protect the privilege, and ensure that its benefits to clients and society are retained.

## CONCLUSION

For these reasons, and those stated in petitioner's brief, the judgment of the Eleventh Circuit should be reversed and this case should be remanded for further proceedings.

Respectfully submitted,

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